



San Francisco Bay Area Rapid Transit District Disparity Study Volume I

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GLOSSARY OF TERMS

Actual availability—refers to firms that have affirmatively shown interest in doing business with BART in one or more of the following ways: bidding for a BART contract; being awarded a BART contract; or, being included on BART’s vendor or plan holder’s list. The difference between “actual availability” and “potential availability” may help identify and narrow down the area of availability that may be affected by discrimination, lack of outreach, lack of interest, lack of specific expertise required by the public entity, and lack of capacity.

Active discrimination—refers to any government entity which has directly discriminated against minority and female business persons through its contracting and procurement activities, or any other of its activities (e.g. employment).

Anecdotal Interview—interview conducted with a business owner within a particular industry, or who has contracted with a public entity, to ascertain his/her personal experiences in doing business within that industry or with that public entity.

Availability—the percentage of firms by race and gender in an industrial category and available to do business with a government entity.

Awardees—firms that actually receive a contract award from BART as reflected through contract awards, purchase orders and payments data.

BART Certified MWBE—firms certified by BART as an MWBE under BART’s Non-Discrimination Program.

BART Certified SBE or MSBE—firms certified by BART as an SBE or Micro SBE, to participate in BART’s SB Elements Program for federally funded contract opportunities.

Bidders—firms that submitted a bid or sub-bid on a BART formal purchasing opportunity or submitted a quote for a BART informal procurement opportunities.

Building Permit Data—construction related data of the permits issued by a government entity to permit contractors to build or renovate structures.

Capacity—a measure (appropriately defined) of additional work a firm can take on at a given point in time.

Census—a complete enumeration, usually of a population, but also of businesses and commercial establishments, farms, governments, and so forth.

Certification—process of qualifying a firm as being at least 51 percent owned, managed and controlled by minorities and female.

Compelling Governmental Interest—compelling reasons by a public entity to remedy past discriminatory treatment of racial or ethnic groups

Consolidated Metropolitan Statistical Area (CMSA)—a metropolitan area containing two or more Primary Metropolitan Statistical Areas (PMSAs).

Contract award data—data gleaned from BART’s bid history data and contract logs that were provided to M³ Consulting by BART’s Purchasing Department. The contract logs represent the universe of formal competitive contracts let by BART.

Contract Commitments—representing the actual firm with which BART executed a contract.

Crososon Requirements—guidelines which govern any state or local political body’s attempt to enact a minority/female business enterprise program which uses set-asides, preferences, goals or other race-conscious measures on condition that a compelling government interest exists and that the program elements are narrowly tailored.

Disadvantaged Business Enterprise Program (DBE Program)—federal program designed to create a level playing field on which a Disadvantaged Business Enterprise (“DBE”) or Small Business (“SB”) can compete fairly for federally funded agreements, contracts and subcontracts, including but not limited to construction, procurement and proposal contracts, professional and technical services agreements and purchase orders.

Disparate Impact—a policy or practice that, although neutral on its face, falls more harshly on a protected group. This impact may be viewed as discriminatory behavior in certain instances. The statistical analysis seeks to determine if there is any disparate impact of an agency’s policy(ies) or practice(s), intended or unintended, on protected classes.

Disparity Ratio—ratio of the percentage of receipts received by M/W/DBEs from a particular public entity in a specific category of work (e.g. construction), to the percentage of firms that are M/W/DBEs available to do business with that public entity; also, the public entity’s M/W/DBE utilization divided by M/W/DBE availability.

Dun & Bradstreet Data—consists of a customized list of firms from its Hoover’s database for the San Francisco Bay Area. The Hoover’s database consists of observations for 448,629 registered firms in San Francisco Bay Area by SIC and NAICs code, and MBE and WBE status.

D&B MWBE—a firm identified by Dun & Bradstreet as an MBE or WBE, but not listed on any certification list utilized for the Master S/M/W/DBE listing.

Factual Predicate—an analysis to determine whether there are any identified instances of past discrimination which must be particularized in a manner that provides guidance for the legislative body to determine the precise scope of the injury it seeks to remedy. It is utilized to determine whether a compelling governmental interest exists to support the utilization of race and gender-conscious remedies. The disparity study is utilized to develop the factual predicate.

Federal Regulation 49 CFR Part 26—federal regulation governing the development and administration of Disadvantaged Business Enterprise Programs.

Formal Purchases—competitive purchasing is required for purchase contracts over \$100,000 and public works contracts over \$10,000. Formal purchasing at BART is done using Invitations for Bid, Competitive Sealed Bids and Requests for Proposals.

Informal Procurement—purchases not requiring advertising and valued at \$100,000 or less for services and procurement, and \$10,000 or less for construction.

Intermediate Scrutiny—is applied to gender and age distinctions and requires the public entity to prove there is a fair and substantial relationship between the classification and the objective of the legislation.

Market Disparity Ratio—ratio of the percentage of receipts accruing to M/W/DBEs in an industrial sector, to the percentage of firms in an industrial sector that are M/W/DBEs; also, market utilization divided by market availability

Marketplace Availability—all firms' available in BART's marketplace, as measured by Dun & Bradstreet and Reed Construction data.

Master S/M/W/DBE List—list of certified SBEs, MBEs, WBEs and DBEs from BART, Caltrans, and Alameda County.

Matchmaking—efforts to bring together potential M/W/DBEs, Non-M/W/DBEs and BART personnel on specific opportunities that encourages an environment of relationship building.

Metropolitan Statistical Area (MSA)—an area, defined by the US Census Bureau, which is an integrated economic and social unit with a population nucleus of at least 50,000 inhabitants. Each MSA consists of one or more counties meeting standards of metropolitan character. The San-Francisco-Oakland-Hayward MSA consists of Alameda, Contra Costa, Marin, San Francisco, and San Mateo counties.

Minority Business Enterprise (MBE)—only firms that are at least 51% owned and controlled by minority individuals. Minority individuals are defined as: African Americans, Asian Americans, Native Americans and Hispanic Americans.

Multivariate Regression—analyzes whether multiple variables, including race and gender, impact an outcome.

M/W/DBE—for computation of availability, utilization and disparity tables, represents potential and actual certified DBE firms.

Narrowly Tailored—a law must be written to specifically fulfill only its intended goal. Race and gender-conscious remedial action be “narrowly tailored” to identify past or present discrimination. At least three characteristics were identified by the court as indicative of a narrowly tailored remedy:

- The program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation; a governmental entity does not have to enact race-neutral means if they are not feasible or conducive to remedying past discrimination;
- The plan should avoid the use of rigid numerical quotas; and,
- The program must be limited in its effective scope to the boundaries of the governmental entity.

Nondiscrimination Programs (ND Program)—established by BART in 1997 to ensure that contractors do not discriminate or give preference in the award of subcontracts based on race, national origin, color, ethnicity or gender. The Non-Discrimination Program applies to non-federally funded contracting opportunities.

Non-M/W/DBEs—for computation of availability, utilization and disparity tables, represents all other firms, exclusive of M/W/DBEs and D&B MWBEs.

On-Call A&E Contracts—a type of indefinite quantity contract utilized for A&E services. BART Planning, Development and Construction financial analysts maintain work plan summaries, which summarizes commitments and payments for individual work plans against each On-call contracts.

Outreach—any effort to communicate with minority or female-owned businesses regarding procurement or contracting opportunities.

Overconcentration—Under 49 CFR Part 26.33, a public entity should monitor its contracts to ensure that DBEs are not overly concentrated in certain product areas as a means of meeting its DBE goals.

Passive Discrimination—participating in the discriminatory or exclusive actions of other agents in the public and private sector.

Passive Participant—refers to any government entity which has indirectly discriminated against minority or female businesspersons by doing business with an industry or business that directly engages in discriminatory practices.

Potential Availability—refers to firms present in BART’s market beyond those “actually available,” to include those that have not bid on BART work or taken other affirmative steps toward doing business specifically with BART (as opposed to other public and private sector clients) during the study period. This availability includes firms identified under both public-sector availability and marketplace availability.

Procurement Forecasting—an organization and its departments determine their procurement needs for a set period of time.

Proposition 209—Article 1, §31 of the California Constitution, which went into effect in 1997. The law amended the state constitution to declare “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.”

Public Contract Code 4100-4114, “Subletting and Subcontracting Fair Practices Act”—code under which the State of California established rules and regulations regarding subcontractor substitutions on Public Works contracts in order to control issues of bid shopping and bid peddling.

Public Sector Availability—Includes lists of available firms known to various public sector agencies, including, but not limited to, BART in the relevant market region. These firms are closer to RWASM, having expressed an interest in contracting opportunities with other public sector agencies with similar standards and limitations as BART.

Pure Prime Utilization—the value of prime contracts net of subcontract value.

Practical Significance—the most commonly used practical significance measure in the EEO context is the 4/5th or 80 percent rule, which indicates how large or small a given disparity

is. An index less than 100 percent indicates that a given group is being utilized less than would be expected based on its availability, and courts have adopted the Equal Employment Opportunity Commission’s “80 percent” rule, that is, that a ratio less than 80 percent presents a prima facie case of discrimination.

Procurement—the acquisition of any good or services in the categories of A&E, construction, professional services, other services and procurement.

PUMS (Public-Use Microdata Samples)—contains records for a sample of housing units with information on the characteristics of each unit and each person in the unit. Files are available from the American Community Survey and the Decennial Census.

Purchase Order—a procurement vehicle used by a government entity to acquire goods or services by opening an order for the goods and services for a specified amount.

Race-Conscious—any business development plan or program which uses race as a criterion for participation.

Race-Neutral—any business development plan or program in which race is not among the criteria for participation.

Rational Basis Standard—tests economic programs that do not make distinctions based on race, ethnic origin or gender. Under this standard, the moving party is required to show that the classification is not rationally related to a valid state purpose.

Ready, Willing and Able Availability Estimate (RWASM Estimate)—the number of M/W/DBE firms ready and willing to perform a particular scope of work and with the ability to expand (or contract) to do the type of work required. Derived from the U.S. Supreme Court’s statement that:

Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.¹

The first component of the model, “ready”, simply means a business exists in the market area. The second component, “willing”, suggests a business understands the requirements of the work being requested, and wants to perform the work. The third component, “able”, defines the group of firms with capacity to do the job.

¹*City of Richmond v. J.A. Croson*, 109 S.Ct. 706, at 729 (1989).

Reed Construction Data—a construction market data resource that tracks construction activity by project and location. The data set also provides project specific information which includes owner of the project, value of project, type of project, general contractor, etc.

Relevant Market—the geographic area reflecting a preponderance of commercial activity pertaining to an entity’s contracting activity based on where bidders, vendors, or awardees are located. A typical range fitting this definition is approximately 75 percent. Relevant Market categories for BART:

- **San Francisco-Oakland-Hayward, CA MSA**—consists of the following five counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo; This MSA is a subset of the San Francisco Bay Area;
- **San Francisco Bay Area (Bay Area—9-county area** which includes the MSA and five additional counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo, Solana, Napa, Santa Clara, Sonoma;
- **San Jose-San Francisco-Oakland, CA (CSA)**—the CSA which include the 9 counties and 3 additional counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo, Solana, Napa, Santa Clara, Sonoma, San Joaquin, Santa Cruz, San Benito;
- **San Jose-San Francisco-Oakland, CA (CSA) and Sacramento County (CSA-Plus)** - the CSA-Plus which include the CSA plus Sacramento County.
- **State of California**
- **Nationwide**

Regression Analysis—a statistical method that analyzes how a single dependent variable may change or vary based on values of one or more independent variables. For example, the contract dollars awarded to M/W/DBEs vary based on characteristics such race, gender, years of experience, and gross annual receipts.

Set-Aside—government policy in which competition for certain contracts/bid opportunities is restricted to certain firms.

Small Business Program (SB Program)—established pursuant to California Public Contract Code Section in 2002. The SB program applies to non-federally funded contract opportunities. The purpose of the SB program is to encourage the full and equitable participation by small businesses in construction, procurement and services contracts. BART uses the state Department of General Services SB Certification. The SB Program consists of a 5% prime preference for SBs on designated contracts and SB subcontracting goals, resulting in a 5% prime preference.

S/M/W/DBE—consists of MBEs, WBEs, DBEs and non-minority SBs.

Statistical Significance—how large or small the disparity ratio is in comparison with the observed percentages based on the statistical confidence level; also, the likelihood that a statistic will vary from a given value by more than a certain amount due to chance.

Strict Scrutiny Standard—is evoked if the classification is suspect, in particular, one based on race, ethnic or alien distinctions or infringements upon fundamental rights. The strict scrutiny test is the most rigorous of the three, requiring the public entity to show compelling governmental interests for making such classifications.

Sunset Clause—a legal or regulatory provision that stipulates the periodic review of a government agency or program in order to determine the need to continue its existence. For race and gender-conscious programs, this can involve: a) a graduation program, b) a definite date to end the program; or c) an annual review of M/W/DBE program efficacy, goals, and utilization.

Systemic Barrier—entrenched discriminatory practices or policies that effectively prevent participation in economic opportunities.

Technical Assistance—the transfer of skills or information from one party or entity to another, through on-site consultation, conferences, brokering of services, training, or general dissemination of information.

T-Test—assesses whether the means of two groups are statistically different from each other.

Utilization—the percentage of receipts in an industrial category that are spent with a given class of firms (e.g., MFBEs).

Vendor—any person or business entity who has come forth to a governmental entity and registered with the entity identifying the products and services they would like to supply/render.

EXECUTIVE SUMMARY

E.1 INTRODUCTION

E.1.1 OVERVIEW OF SCOPE OF WORK

The San Francisco Bay Area Rapid Transit District (BART) has established a Disadvantaged Business Enterprise (DBE) Program, consistent with the requirements of 49 Code of Federal Regulations (CFR) Part 26. BART has also established a Non-Discrimination for Subcontracting Program for Non-Federally Funded Contracts. To support the District's DBE Program and to determine Availability analysis for its Non-Discrimination Program, BART commissioned Miller³ Consulting, Inc. (M³ Consulting) on May 18, 2015 to conduct a Disparity Study (the Study) by performing the scope of work outlined below:

- Investigate whether or to what extent discrimination exists in the contracting industry relevant to BART contracting activities in the BART market area;
- Satisfy all legal requirements for such a study established by all relevant judicial precedent including a determination whether statistically significant disparities exist regarding DBE utilization in the contracting industry relevant to BART contracting activities in the BART market area;
- Provide data to support the District's Disadvantaged Business Enterprise (DBE) program, including setting of its Triennial DBE Goal, Contract Specific DBE goals and Small Business Entity (SBE) goals under 49 CFR Part 26; and,
- Provide data on the availability of Small Business Entities (SBEs), Minority and Women-Owned businesses in the BART market area to support the District's Non-Discrimination Program for Subcontracting on Non-Federally Funded Contracts (ND Program) and Small Business Elements of the District's DBE Program (SB Elements).

M³ Consulting conducted this study consistent with current legal and regulatory standards applicable to BART in the 9th Circuit and the State of California, including *Western States Paving Co., Inc., v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005), Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), State of California laws, including Proposition 209 and various other federal/state/local/BART sources.

E.1.2 OVERVIEW OF BART'S CURRENT RACE/GENDER-CONSCIOUS AND RACE AND GENDER-NEUTRAL PROGRAMS

BART administers four programs targeted to promote inclusion of DBEs and SBs and one program that ensures that primes do not discriminate or give preference in the award of subcontracts based on race, national origin, color, ethnicity or gender. The four programs are:

- Disadvantaged Business Enterprise (DBE) Program;
- DBE Program Small Business Elements (SBE);
- Small Business (SB) Program; and,
- Non-Discrimination for Subcontracting Program.

An overview of each program is provided below.

A. Disadvantaged Business Enterprise (DBE) Program (Federally Funded)

As a recipient of federal funds from the Federal Transit Administration (FTA), BART's Disadvantaged Business Program has been developed pursuant to the requirements of 49 CFR Part 262. The purpose of the DBE program is "to create a level playing field on which a Disadvantaged Business Enterprise ("DBE") can compete fairly for federally funded agreements, contracts and subcontracts, including but not limited to construction, procurement and proposal contracts, professional and technical services agreements and purchase orders."³

Based on the results of the 2009 Disparity Study, BART could establish DBE goals on Federally Funded Construction contracts only. For Procurement and Professional Services, including Architectural and Engineering, BART utilized exclusively race and gender-neutral efforts.

B. DBE Program Small Business Elements (SBE)

Under the DBE Program Small Business Elements, BART includes all reasonable steps to eliminate obstacles to small business participation on Federally funded contracts. SBE program efforts can include:

- Race and gender-neutral SBE goals on Federally Funded contracts;

² 49 CFR Part 26 was enacted on January 8, 1999 and revised on October 1, 2006 and October 2, 2014.

³ San Francisco Bay Area Rapid Transit District Disadvantaged Business Enterprise Program, February 2012, p. 4.

- MSBE set-aside contracts on federal funded contracts. MSBE set-aside contracts cannot exceed the following limits:
 - Construction—\$2 million
 - Services—\$3 million
 - Procurement—\$3 million

MSBE set-aside contracts are not eligible for SBE or DBE goals, although MSBE vendors are encouraged to include SBE and DBE subcontractors.

C. Small Business (SB) Program (Non-Federally Funded)

BART has established a Small Business (SB) Program, pursuant to California Public Contract Code Section 2002. The purpose of the SB Program is to encourage the full and equitable participation by small businesses in Non-federally funded construction, procurement and services contracts. The SB Program is targeted to:

- BART award of contracts;
- The award of contracts by Prime Contractors to First Tier Subcontractors; and,
- The award of contracts by First Tier Subcontractors to Second Tier Subcontractors.⁴

To encourage SB prime participation on contracts under \$10,000,000, BART may, at its sole discretion, apply a bid preference to SB Bidders of up to 5 percent of the lowest responsible bidder's bid amount up to a total amount of \$250,000 on contracts valued under \$10,000,000. An annual limit of \$2,000,000 for total dollar preferences is allowed each year. However, the actual contract will reflect the actual amount of the bid.

For contracts over \$10,000,000, BART may apply a SB subcontracting, participation goal. For prime vendors that meet the SB subcontracting goal, a bid preference up to 5 percent of the lowest responsible bidder's bid amount up to a total of \$1,000,000 will be applied. However, the actual contract will reflect the amount of the original bid. BART may, at its discretion, count Second Tier Subcontractors toward the SB goal, upon the First-Tier subcontractor meeting the requirements outlined in the SB Program.⁵ Under California Public Code Section 22160 et seq, BART may also establish three separate SB goals for construction, services, and procurement on Design-Build contracts. A 5 percent preference will apply.

D. Non-Discrimination (ND) in Subcontracting Program (Non-Federally Funded)

Under Proposition 209 adopted by the State in 1996, BART is prohibited from taking measures that discriminate for or against the participation of firms based on their race or

⁴ BART Small Business (SB) Program Non-Federally Funded Contracts, 9/01/11, p. 2.

⁵ Ibid, pp. 6-8.

gender, unless required as a Federal grant requirement. As a result, in 1997, the BART Board adopted BART's Non-Discrimination Program for Subcontracting on Non-Federally Funded Contracts (ND Program). Under the terms of the ND Program, the purpose is to ensure that contractors do not discriminate or give a preference in the award of subcontracts on the basis of race, national origin, color, ethnicity, or gender.

Under BART's ND Program, which is a race and gender-neutral program, there has been some measurable MWBE participation although it has not resulted in the overall participation of MWBEs matching availability in BART's Non-Federal construction, procurement, or services contracting. The Disparity Study will provide up to date availability percentages for MBEs and WBEs for the ND Program.

The ND Program does not require a bidder to subcontract any portion of the work. If the bidder does not subcontract any of the work, the ND Program does not apply. Further, the ND Program does not utilize subcontracting percentage goals nor require a bidder to make good faith efforts to utilize minority owned business enterprise (MBE) and women owned business enterprises (WBE) subcontractors.

However, if the bidder does subcontract a portion of the work, a determination is first made whether the bidder has listed subcontracts in dollar amounts that reflect the availability percentages of MBEs and WBEs in the pool of all subcontractors available to perform the contract work. The availability percentages for MBEs and WBEs are not subcontracting goals. They are, instead, what MBE and WBE participation would be expected in the absence of discrimination. If the bidder meets the availability percentages, the bidder is presumed to have not discriminated and is eligible for award of the contract.

If the bidder does not meet the availability percentages, the bidder must submit documentation pertinent to determining if the bidder discriminated. If the documentation shows no evidence of discrimination the bidder is recommended for award of the contract. If documentation shows discrimination, a hearing is set before a hearing officer and the District has the burden to prove that the bidder discriminated. A bidder is non-responsive only if it does not cooperate in providing evidence of Non-Discrimination or if a finding is made after a hearing that the bidder has discriminated in the award of subcontracts. A bidder cannot be found non-responsive simply because it did not select subcontractors in a manner which reflects MBE and WBE availability as long as it has not discriminated.

E.2 MILLER³ CONSULTING'S APPROACH AND METHODOLOGY

M³ Consulting's exclusive disparity study methodology includes ten analyses which lead to overall conclusions and recommendations.

E.2.1 M³ CONSULTING'S 10-PART DISPARITY STUDY METHODOLOGY

M³ Consulting employs a 10-part disparity study methodology that provides a complete factual predicate consistent with evolving case law and BART's regulatory environment. The statistical analysis—relevant market, availability, utilization, disparity and capacity—comports with the requirements of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989), *Adarand Contractors, Inc. v. Federica Pena*, 515 U.S. 200, 115 S. Ct. 2097 (1995) and *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) and determines whether there are statistically significant disparities from which an inference of discrimination may be drawn. The remaining analysis reflected under the industry and market analysis assist in determining whether organizational factors (active discrimination or exclusion) or private sector and marketplace factors (passive discrimination or exclusion) cause any disparity found. Together, these findings allow BART to determine whether there is a compelling governmental interest in utilizing race and gender-conscious remedies for any statistically significant disparity. The combined analysis also leads to a set of customized recommendations that includes race and gender-neutral initiatives and narrowly tailored race and gender-conscious initiatives.

BART Disparity Study

| Industry Analysis | Statistical Analysis | Market Analysis | Conclusions | Recommendations |
|--|---|---|---|---|
| <ul style="list-style-type: none"> •Legal Analysis •Procurement and M/W/DBE Operational Analysis | <ul style="list-style-type: none"> •Relevant Market •Availability Analysis •Utilization Analysis •Disparity Ratios •Regression and Capacity Analysis | <ul style="list-style-type: none"> •Anecdotal and Survey Analysis •Race-Gender-neutral Analysis •Private Sector Analysis | <ul style="list-style-type: none"> •Finding of discrimination, passive or active, if any •Identification of barriers to M/W/DBE participation | <ul style="list-style-type: none"> •Procurement and M/W/DBE programmatic initiatives •Goal-setting •Non-Discrimination initiatives •Management and Technical Assistance |

Description of Disparity Study Components

1. **Legal Analysis** outlines the legal standards of *Richmond v. Croson*, *Adarand v. Peña* and their progeny, as well as around the country. Such a legal analysis provides critical insight to current judicial opinions relevant to both DBE program design, Non-Discrimination programs and disparity study analysis.
2. **Procurement and DBE Program Operational Analyses** examines BART’s contracting history to determine the impact of BART’s policies, procedures and practices on M/W/DBEs’ ability to do business with BART, along with the effectiveness of the DBE and SB Program operations on increasing M/W/DBE participation.
3. **Relevant Market Analysis** determines the geographic boundaries within which BART performs the substantial part (about 70 percent) of its business activities. The identification of the bounds is also guided by legal criterion that BART must refine its efforts to impact DBE business activity to its market area.
4. **Availability Analysis** determines the available M/W/DBE and non-M/W/DBE firms who are available to do business with BART within the determined relevant market.
5. **Utilization Analysis** quantitatively examines BART’s contracting history and determines the number of contracts and levels of expenditures with M/W/DBEs.
6. **Disparity Analysis** determines the difference between the availability of M/W/DBEs and their utilization by BART and whether any disparity is statistically significant.
7. **Capacity and Regression Analyses** examines differences in capacity of firms based on race and gender using established statistical methods and also examines whether race/gender and ethnicity still impacts the participation decision once a set of variables that proxy capacity are controlled for.

8. **Anecdotal and Survey Analyses** determine the experiences of M/W/DBEs and non-M/W/DBEs attempting to do business with BART and in the business community overall. Further, the survey provides information on business characteristics, such as owner qualifications, years in business, capacity, and credit market experiences.
9. **Race- and Gender-Neutral Analysis** determines the effectiveness of race- and gender-neutral programs in increasing M/W/DBE participation in both public and private sector opportunities.
10. **Private Sector Analyses** determine M/W/DBE participation in private sector opportunities. Factors that impact business formation and self-employment are also analyzed in this analysis.

The methodology components that M³ Consulting deploys reflect the continuing development of case law that has increased the level and sophistication of the statistical analysis necessary to comply with *Croson* and *Adarand* standards.

E.2.2 STATISTICAL METHODOLOGY

The statistical methodology below discusses in more detail relevant market, availability, utilization, and disparity. It includes various definitions of availability and M³ Consulting's "Ready, Willing and Able" (RWASM) model. M³ Consulting has adapted this model to the specific BART data sources available for this study. Also discussed are the types of utilization analysis that will be performed. The statistical methodology section concludes by defining the disparity ratio and significance tests, crucial for drawing conclusions regarding any disparity in BART's recent history of contracting with M/W/DBEs.

To conduct the analysis, M³ Consulting collected vendor, bidder, contract award, purchase order and payments data for calendar years 2011-2014, covering both Federally-funded and Non-federally funded contracts.

A. Relevant Market

The *Croson* statistical analysis begins with the identification of the relevant market. The relevant market establishes geographical limits to the calculation of M/W/DBE availability and utilization. Most courts and disparity study consultants characterize the relevant market as the geographical area encompassing most of a public entity's commercial activity. The *Croson* Court required that an MBE program cover only those groups that have actually been affected by discrimination within the public entity's jurisdiction.⁶

⁶ *Richmond v. Croson*, at 725.

Two methods of establishing the relevant market area have been used in disparity studies. The first utilizes vendor and contract awardee location of dollars expended by an entity in the relevant industry categories. In the second method, vendors and contractors from an entity's vendor or bidder list are surveyed to determine their location. The former is based on approaches implemented under the U.S. Justice Department guidelines for defining relevant geographic markets in antitrust and merger cases. M³ Consulting has developed a method for determining an entity's relevant market by combining the above methods and using an entity's bidder lists, vendor lists, and awardee lists as the basic foundation for market definition.

By examining the locations of bidders, vendors, and winners of contract awards, M³ Consulting seeks to determine the area containing a preponderance of commercial activity pertaining to an entity's contracting activity. While case law does not indicate a specific minimum percentage of vendors, bidders, or contract awardees that a relevant market must contain, M³ Consulting has determined a reasonable threshold is somewhere around 70 percent, each, for bidders, vendors, and contract award winners. Further analysis may be necessary if there are "large" differences in the percentages of these three measures.

B. Availability Analysis

The fundamental comparison to be made in disparity studies is between firms owned by minorities and/or women ("MBEs and WBEs") and other firms ("non-MWBEs") ready, willing and able to perform a particular service (i.e., are "available"), and the number of such businesses actually being utilized by the locality or its prime contractors. This section presents a discussion of the availability estimates for M/W/DBEs who are ready, willing and able to perform work on contracts for BART.

Availability is the most problematic aspect of the statistical analysis of disparity. It is intrinsically difficult to estimate the number of businesses in the marketplace that are ready, willing and able to perform contracts for or provide services to a particular public entity. In addition to determining an accurate head count of firms, the concomitant issues of capacity, qualification, willingness, and ability complicate the production of accurate availability estimates.

1. Miller³ Consulting, Inc. Availability Model

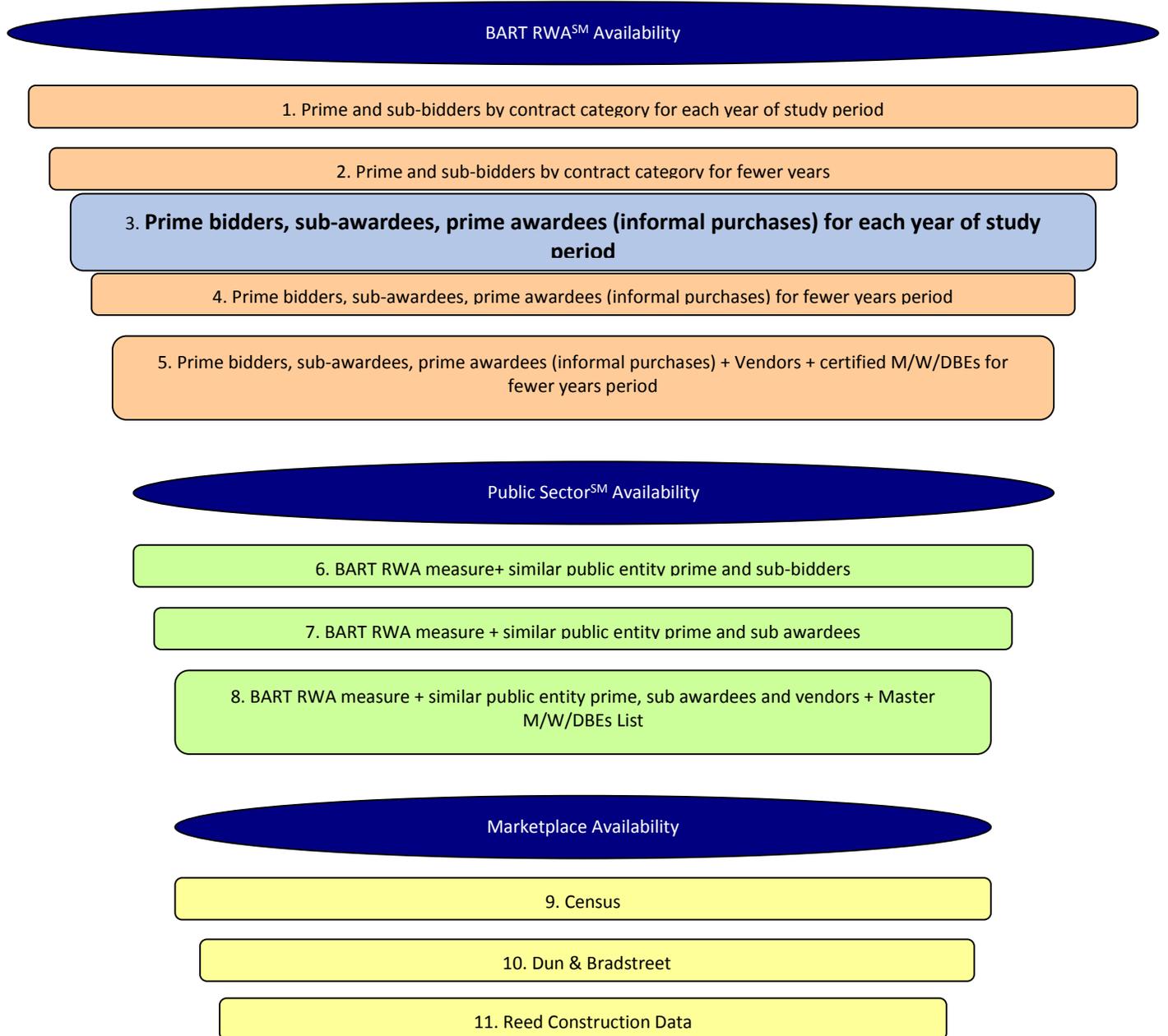
M³ Consulting employs two general approaches to measuring availability: the Ready, Willing and Able (RWASM) Model and Marketplace Availability. In summary, the Availability measures can fall into the following categories:

- **RWASM Availability**—Those firms who are ready, willing and able to do business with BART;
- **Public Sector Availability**—Those firms who are ready, willing and able to do business with similar public sector agencies within BART’s marketplace⁷; and,
- **Marketplace Availability**—All firms’ available in BART’s marketplace, as measured by Census, Dun & Bradstreet and Reed Construction data.

The Availability matrix below in Figure E.1 outlines M³ Consulting’s Availability Model. The matrix starts with the optimum availability measure of those firms “ready, willing and able” to do business with BART and cascades down to less optimum measures. Factors that determine which level of availability best suits BART’s environment include quality of available data, legal environment, and previous levels of inclusion of M/W/DBE in bidding and contracting activity. For BART, Level 3 RWASM Availability was deemed the most representative and robust, in light of the completeness of data provided by BART.

⁷This analysis requires inter-governmental cooperation between public entities providing bidder, vendor and awardee data, thus is not performed, unless such agreement is developed for individual agencies or a consortium of agencies conducted a consortium disparity study.

Figure E.1
RWASM Availability Model



Source: M³ Consulting, Inc.

C. Utilization Analysis

Utilization represents the contracting and subcontracting history of Non-M/W/DBEs and M/W/DBEs with BART. In developing the contract database to be used as the basis for determining utilization, there are three alternative measures of utilization that can be taken in each procurement category. These are:

1. The numbers of contracts awarded;
2. The dollar value of contracts received; and,
3. The raw numbers of firms receiving contracts.

The current report presents two of the three measures of utilization: the number of contracts awarded and the dollar value of the contract awards. Both dollars and counts are reported in order to determine if there are any outliers or large single contracts that cause utilization dollar values to be at reported levels. These were preferred over the third measure—the number of firms, which is less exact and more sensitive to errors in measurement.

For instance, if a single firm, owned by a Non-M/W/DBE, received 30 contracts for \$5 million, and ten African American-owned firms received one contract each worth \$100,000, measured by the number of firms, African American-owned firms would appear to be over utilized, and Non-M/W/DBEs underutilized. Using the number of contracts and the dollar value of contracts awarded, the aforementioned result would reverse (depending on relative availability).

M³ Consulting's position with regard to percentage estimates of utilization, by the dollar value of contracts and number of contracts, is that discrimination would be more likely to affect the dollars awarded than the number of contracts awarded to M/W/DBEs or the number of M/W/DBEs utilized, particularly if there are stereotypical attitudes that M/W/DBEs cannot handle larger contracts, and the largest volume of contracts awarded are smaller contracts.

M³ Consulting also sought to analyze subcontracting utilization data. Because prime contractors, especially in Construction, Construction-related Professional Services and Architecture and Engineering, often subcontract work to other contractors/consultants and because the utilization of M/W/DBEs in the absence of a set-aside or goal provision usually occurs at the subcontract level, assembling data on subcontract work is critical to utilization analysis.

In the area of Construction and Architecture and Engineering contracting, the standard presentation of utilization data by M³ Consulting is to show Total “Pure Prime + Subcontractor” utilization and Subcontractor utilization in separate tables, if data allows. “Pure prime utilization” based on dollar value of contracts is defined here differently from “prime contract award value” due to the necessity to avoid double-counting of subcontract awards when examining subcontractor utilization. “Pure prime utilization” is correctly defined as the value of prime contracts *net of subcontract value*. This magnitude, when added to the value of subcontractor utilization, results in a correct measurement of “total” utilization, by the M/W/DBE category.

D. Disparity Analysis

A straightforward approach to establishing statistical evidence of disparity between the availability of M/W/DBEs and the utilization of M/W/DBEs by BART is to compare the utilization *percentage* of M/W/DBEs with their availability *percentage* in the pool of total businesses in the relevant market area. M³ Consulting’s specific approach, the “Disparity Ratio,” consists of a ratio of the percentage of dollars spent with M/W/DBEs (utilization), to the percentage of those businesses in the market (availability).

Disparity ratios are calculated by actual availability measures. The following definitions are utilized in the M³ Consulting ratio:

| | | |
|----------------|---|---------------------------------------|
| A | = | Availability proportion or percentage |
| U | = | Utilization proportion or percentage |
| D | = | Disparity ratio |
| N _w | = | Number of women-owned firms |
| N _m | = | Number of minority-owned firms |
| N _t | = | Total number of firms |

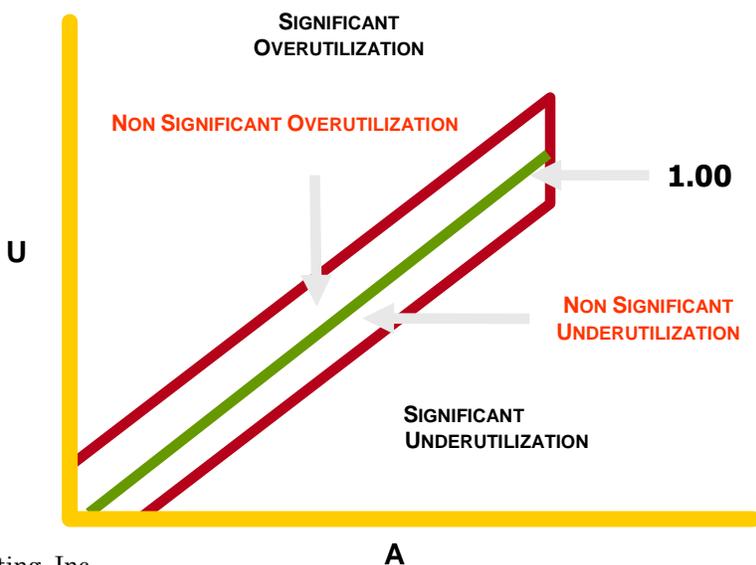
Availability (A) is calculated by dividing the number of minority and/or women-owned firms by the total number of firms. Utilization (U) is calculated by dividing total dollars expended with minority and women-owned firms by the total expenditures.

$$\begin{aligned}A_w &= N_w / N_t \\A_m &= N_m / N_t \\D &= U / A\end{aligned}$$

When D=1, there is no disparity, (*i.e.*, utilization equals availability). As D approaches zero, the implication is that utilization is disproportionately low compared to availability. As D gets larger (and greater than one), utilization becomes disproportionately higher compared

to availability. Statistical tests are used to determine whether the difference between the actual value of D and 1 are statistically significant, (*i.e.*, whether it can be stated with confidence that the difference in values is not due to chance (see Figure E.2).

Figure E.2
Disparity Ratio Indicating Areas of Significant and Non-Significant Disparity and Overutilization



The statistical disparity ratio used in this study measures the difference between the proportion of available firms and the proportion of dollars those firms received. Therefore, as the proportion of contract dollars received becomes increasingly different than the proportion of available M/W/DBEs, an inference of discrimination can be made.

1. Statistical Significance

The concept of statistical significance as applied to disparity analysis is used to determine if the difference between the utilization and availability of M/W/DBEs could be attributed to chance. Significance testing often employs the t-distribution to measure the differences between the two proportions. The number of data points and the magnitude of the disparity affect the robustness of this test. The customary approach is to treat any variation greater than two standard deviations from what is expected as statistically significant.

A statistical significant outcome or result is one that is unlikely to have occurred as the result of random chance alone. The greater the statistical significance, the smaller the probability that it resulted from random chance alone. P-value is a standard measure used to represent the level of statistical significance. It states the numerical probability that the stated relationship is due to chance alone. For example, a p-value of 0.05 or 5 percent indicates that the chance a given statistical difference is due purely to chance is 1 in 20.

2. Practical Significance

The concept of statistical significance should not be confused with practical significance. According to Mansfield, even if there is a statistically significant difference between a sample value and a postulated value of a parameter, the difference may not really matter.⁸ This means disparities not statistically significant are not necessarily caused by chance. It also means that chance cannot be ruled out as a cause.

The most commonly used practical significance measure in the EEO context is the 4/5th or 80 percent rule, which indicates how large or small a given disparity is. An index less than 100 percent indicates that a given group is being utilized less than would be expected based on its availability, and courts have adopted the Equal Employment Opportunity Commission's "80 percent" rule, that is, that a ratio less than 80 percent presents a prima facie case of discrimination⁹.

Under the EEOC's "four-fifths" rule, a disparity ratio is substantively significant if it is 0.8 or less on a scale of 0 to 1 or 80 or less on a scale of 1 to 100 (i.e., Group A selection rate divided by Group B selection rate). Codified in the Uniform Guidelines on Employee Selection Procedures (UGESP, section 4D), the rule is described as follows:

"A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms and

⁸ Mansfield, Edwin, *Statistics for Business and Economics*, p. 322. Two standard deviations imply 95 percent confidence level which is the norm of the courts.

⁹ *Engineering Contractors II*, 122 F3d at 914; see 29 C.F.R. § 1607.4(D) ("A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.")

where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant.”

Thus, the 4/5th rule is a measure of the size of the disparity, but may need to be interpreted in light of particular context (e.g., sample size, in combination with statistical significance testing). However, case law suggests that the 4/5th rule can be interpreted as adequate stand-alone evidence in some situations, although it is unclear exactly what circumstances warrant such interpretation. The 80 percent rule is a general rule, and other factors such as statistical significance, sample size, discouraged applicants, etc., should be analyzed. The rationale for combining practical and statistical significance results is an intuitive one. In situations where the measures come to identical conclusions, the analyst can usually feel very confident in a finding of meaningful impact or no impact. In other situations, context may play an important role when statistical and practical significance measures produce different conclusions (i.e., when a standard deviation analysis is greater than 2.0 but the 4/5th rule is not violated)¹⁰.

E.3 FINDINGS AND CONCLUSIONS

E.3.1 SIGNIFICANT DISPARITY

Based on the statistical findings in the disparity chapter, the utilization of qualified firms as reflected by the percentage of contracts or purchase orders awarded and payments made, appears to be less inclusive than warranted, when compared to the availability of ready, willing and able firms (RWASM). Thus, M³ Consulting draws an inference of discrimination against the following race, ethnicity and gender groups:

¹⁰ See Tables 1 and 2 that explain this in, “A Consideration of Practical Significance in Adverse Impact Analysis,” Eric M. Dunleavy, July 2010, <http://dciconsult.com/whitepapers/PracSig.pdf>

| Table E.1. Inference of Discrimination Based on Findings of Statistically Significant Disparity By Race/Ethnicity/Gender By Procurement Type By Federal/Non-Federal | | | |
|--|---|---|---|
| Procurement Areas | Overall | Federal | Non-Federal |
| Architectural and Engineering Services Agreements | <ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females • African Americans • Native Americans | <ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females |
| Construction Contracts | <ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females |
| Professional Services | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females |
| Other Services | <ul style="list-style-type: none"> • African Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Caucasian Females | <ul style="list-style-type: none"> • Hispanic Americans • Caucasian Females |
| Procurement Contracts | <ul style="list-style-type: none"> • African Americans • Asian Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Asian Americans • Caucasian Females |

Source: M³ Consulting

Below is a discussion of the factors leading to and impacting the findings of statistically significant disparities above.

E.3.2 STATISTICAL FINDINGS IMPACTING STATISTICALLY SIGNIFICANT DISPARITY

A. Relevant Market

In order to estimate availability, the marketplace in which BART purchases from vendors needs to be defined. This enables a practical count of “available” firms and also facilitates policy implementation.

Based on the data provided for this study, five relevant markets were defined and are presented below:

Executive Summary

- San Francisco-Oakland-Hayward, CA MSA—consists of the following five counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo; This MSA is a subset of the San Francisco Bay Area;
- San Francisco Bay Area—consists of the following nine counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo, Solano, Napa, Santa Clara, Sonoma
- San Jose-San Francisco-Oakland, CA CSA—consists of the following twelve counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo, Solano, Napa, Santa Clara, Sonoma, San Joaquin, Santa Cruz, San Benito
- San Jose-San Francisco-Oakland, CA CSA + Plus Sacramento County—consists of the following twelve counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo, Solano, Napa, Santa Clara, Sonoma, San Joaquin, Santa Cruz, San Benito, Sacramento County
- State of California
- Nationwide

The relevant market for each industry category is summarized in Table E.1, for each procurement type by location because of the commercial activity that BART conducts with its vendors in different procurement areas.

| | MSA | Bay Area | State | Nationwide |
|-------------------------------------|------------|-----------------|--------------|-------------------|
| Architecture and Engineering | √ | | | |
| Professional Services | | | √ | |
| Construction | | √ | | |
| Other Services | | | √ | |
| Procurement | | | | √ |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Plan Holders; BART Vendors

B. Availability Analysis

Based upon industry standards, M³ Consulting’s practice, experience and understanding of data available, credence is typically placed on RWASM estimates derived from bidders, sub-bidders and awardees in that order of importance. Marketplace availability measures, based on D&B Availability, are presented as a benchmark of minority and women-owned firm

availability (inclusive of certified and unverified MBEs/WBEs) and for BART to consider potentially available firms for outreach purposes.

For construction, MBE availability percentage is about 18.43 percent which is almost evenly derived from the Asian American and Hispanic American MBE groups and a smaller portion to African American-owned firms. Caucasian Female-owned firms are similar to African American-owned firms in their availability in the construction industry at 4.48 percent available based on the RWASM availability measure. The marketplace availability measure based on construction shows a lower presence of MBEs in the industry and a similar presence of Caucasian Female-owned firms. In A&E, the availability of M/W/DBEs was at 29.82 percent based on RWASM availability estimates. MBEs were at 22.43 percent and Caucasian Females at 7.39 percent in the MSA marketplace. The Dun and Bradstreet availability measure shows a slightly lower representation in the marketplace of M/W/DBEs at 21.53 percent with Caucasian Female-owned firms almost at par with the RWASM availability estimate at 8.1 percent in the MSA. For Professional Services, M/W/DBEs availability based on RWASM availability was only at 11.89 percent, while the marketplace availability reflecting the upper bound of available firms was at 14.45 percent. MBEs and Caucasian Female-owned firm were both evenly low in availability based on RWASM availability estimates.

Other Services witnessed a declining pattern in M/W/DBEs presence with only 7.22 percent availability; Caucasian Female-owned firms represented 1.37 percent of availability. Marketplace estimates of available firms shows a higher proportion of M/W/DBEs at 16.26 percent and of Caucasian Female-owned firms at 8.86 percent. It may imply that Caucasian Female-owned firms are present in the market area, but do not participate in BART contracts. The presence of Caucasian Female-owned firms in Procurement is considerably higher in the marketplace at 8.33 percent compared to only 0.67 percent availability at BART. In general, the Procurement industry shows a very small presence of M/W/DBEs in the RWASM availability pool at 2.93 percent as opposed to 16.56 percent provided by Dun and Bradstreet's potentially available firms. Whether the latter meet the RWASM availability criteria or express interest in BART contracting process remains to be explored.

Table E.3.
Summary Table - RWASM Availability Level 3 Percentage Participation
San Francisco Bay Area Rapid Transit District
Relevant Market; 2011 – 2014

| Ethnicity | A&E ¹ | Construction ² | Professional Service ³ | Other Services ⁴ | Procurement ⁵ |
|------------------------------|------------------|---------------------------|-----------------------------------|-----------------------------|--------------------------|
| Race/Ethnicity/Gender | | | | | |
| Non-M/W/DBE | 62.27 | 67.25 | 82.60 | 83.51 | 93.63 |
| African American | 7.65 | 4.86 | 3.96 | 3.78 | 0.84 |
| Asian American | 10.29 | 6.48 | 2.42 | 0.69 | 0.84 |
| Hispanic American | 3.96 | 6.85 | 2.42 | 1.37 | 0.59 |
| Other MBE | 0.53 | 0.25 | 0.00 | 0.00 | 0.00 |
| Total MBE | 22.43 | 18.43 | 8.81 | 5.84 | 2.26 |
| Caucasian Female | 7.39 | 4.48 | 3.08 | 1.37 | 0.67 |
| Total M/W/DBE | 29.82 | 22.91 | 11.89 | 7.22 | 2.93 |
| D&B MWBE | 7.92 | 9.84 | 5.51 | 9.28 | 3.43 |
| Total | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors
 Level 3: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data
¹MSA, ²Bay Area, ³State of California, ⁴Nationwide

Table E.4.
D&B Summary Availability
San Francisco Bay Area
2014

| | A&E | | Construction | | Professional Services | | Other Services | | Procurement | |
|--------------------|--------------|---------------|--------------|---------------|-----------------------|---------------|----------------|---------------|---------------|---------------|
| | # | % | # | % | # | % | # | % | # | % |
| Non-MWBE | 2,471 | 78.47 | 6,775 | 88.18 | 11,286 | 85.55 | 8,994 | 83.74 | 9,615 | 83.44 |
| MBE | 253 | 8.03 | 364 | 4.74 | 444 | 3.37 | 383 | 3.57 | 529 | 4.59 |
| MWBE | 170 | 5.40 | 165 | 2.15 | 419 | 3.18 | 411 | 3.83 | 419 | 3.64 |
| WBE | 255 | 8.10 | 379 | 4.93 | 1,044 | 7.91 | 952 | 8.86 | 960 | 8.33 |
| Total MWDBE | 678 | 21.53 | 908 | 11.82 | 1,907 | 14.45 | 1,746 | 16.26 | 1,908 | 16.56 |
| Total | 3,149 | 100.00 | 7,683 | 100.00 | 13,193 | 100.00 | 10,740 | 100.00 | 11,523 | 100.00 |

Source: 2014 D&B Hoovers Data; M³ Consulting
 *Bay Area—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Napa, Solano, Sonoma
 **Equivalent to Caucasian Female-owned firms

When RWASM Availability is adjusted to the requirements of BART’s Non-Discrimination Program in Subcontracting, the following availability results:

Table E.5.
Non-Discrimination Availability, Level 3 RWASM Availability
San Francisco Bay Area Rapid Transit District
Relevant Market; 2011-2014

| | A&E ¹ | Construction ² | Professional Services ³ | Other Services ³ | Procurement ⁴ |
|----------------------------------|------------------|---------------------------|------------------------------------|-----------------------------|--------------------------|
| Race/Ethnicity/Gender | | | | | |
| Non-MWBE | 62.01 | 67.25 | 82.6 | 83.51 | 93.63 |
| African American | 7.65 | 4.86 | 3.74 | 3.78 | 0.75 |
| Female | 2.37 | 0.75 | 1.76 | 0.69 | 0.17 |
| Male | 5.28 | 4.11 | 1.98 | 3.09 | 0.59 |
| Asian American | 10.03 | 5.48 | 2.42 | 0.34 | 0.84 |
| Female | 2.64 | 1.62 | 0.66 | 0 | 0.25 |
| Male | 7.39 | 3.86 | 1.76 | 0.34 | 0.59 |
| Caucasian Female | 6.86 | 3.99 | 2.86 | 1.37 | 0.59 |
| Hispanic American | 3.69 | 6.35 | 2.2 | 1.37 | 0.59 |
| Female | 1.06 | 1.87 | 0.44 | 0.69 | 0.08 |
| Male | 2.64 | 4.48 | 1.76 | 0.69 | 0.5 |
| Native American | 0 | 0 | 0 | 0 | 0 |
| Female | 0 | 0 | 0 | 0 | 0 |
| Male | 0 | 0 | 0 | 0 | 0 |
| Other MBE | 0.53 | 0.12 | 0 | 0 | 0 |
| Female | 0.53 | 0.12 | 0 | 0 | 0 |
| Male | 0.26 | 0 | 0 | 0 | 0 |
| Total BART Certified MWBE | 28.76 | 20.8 | 11.23 | 6.87 | 2.76 |
| Female | 13.46 | 8.34 | 5.73 | 2.75 | 1.09 |
| Male | 15.57 | 12.45 | 5.51 | 4.12 | 1.68 |
| Other Certified S/M/W/DBE | 1.32 | 2.12 | 0.66 | 0.34 | 0.17 |
| Total MWBE | 30.08 | 22.91 | 11.89 | 7.22 | 2.93 |
| D&B MWBE | 7.92 | 9.84 | 5.51 | 9.28 | 3.43 |
| Total | 100 | 100 | 100 | 100 | 100 |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors

Level 3: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data

¹MSA, ²Bay Area, ³State of California, ⁴Nationwide

Often, it is argued that actual availability, based on bidders, is significantly impacted by the presence of race and gender-conscious goals. BART's data reflects M/W/DBE participation in Construction, where BART does apply race and gender-conscious goals on Federal contracts, but to suggest that the difference is due to the utilization of DBE goals would be conjecture.

This is highlighted even more by Utilization results, where BART has been able to achieve a greater proportion of M/W/DBE utilization in A&E and Professional Services areas, where race and gender-conscious goals cannot be applied.

Potentially, the difference in Potential Availability and Actual Availability could reflect the impact on Actual Availability of “But-For Discrimination”, but it could also reflect the absence of outreach by BART to potentially available firms, as well. In other words, from the RWASM estimates, bidders, sub-bidders, and awardees are presumed to be actually available, whereas the D&B figures includes firms that may not be actually available due to discrimination or other factors. Significantly more research and analysis is necessary to determine the reasons for differences in availability levels between RWASM and D&B. Other than race and gender-conscious goals, such factors influencing the difference between RWASM Availability measures and D&B Availability figures could include, but not be limited to:

- Firms available in D&B, while falling into a North American Industry Classification System code utilized by BART, do not provide the specific goods and services required by BART;
- Firms within the D&B availability pool may not be interested in doing business with BART or in the public sector; and,
- As a public entity with consistent commitment in its Strategic Mission to community economic development, BART may be viewed by the community as a more inclusive environment, than the private sector or other public entities.

As the Office of Civil Rights begins to conduct inclusive outreach to and surveying of firms on the D&B list to determine their interest and ability to provide their services to BART and the willingness of unverified D&B Minority/Women-business enterprises to become certified to be eligible for BART’s race and gender-conscious initiatives, more conclusive determinations can be made regarding the difference between RWASM and D&B availability figures.

C. Utilization Analysis

Table E.6 reflects a summary of utilization for all procurement types. This summary is followed by more detailed analysis for A&E and Construction in Tables E.7 and E.8.

Based on the most robust data source for each procurement type—contract awards, purchase orders or payments—M/W/DBEs achieved the highest levels of participation in A&E at 34.60 percent, utilizing on On-call A&E Payments, and the lowest levels of participation in Procurement at 1.36 percent.

The level of achievement in A&E is worthy of note, given that there were no race and gender-conscious goals utilized in this procurement category. On the other hand, in Construction, the only procurement category where BART can utilize race and gender-conscious goals on federal contracts, M/W/DBE participation reached only 11.38 percent, even though BART's overall triennial DBE goal was 22 percent for 2011-2013 and 23 percent for 2014-2016 and despite achieving over 40 percent M/W/DBE participation at the subcontracting level. A key difference between A&E and Construction levels of M/W/DBE participation is Pure Prime participation, 36 percent for A&E M/W/DBE Pure Prime utilization, combined with 32.38 percent for M/W/DBE subcontracting, contrasted with 0.85 percent for Construction M/W/DBE Pure Prime utilization, combined with 40.64 percent for M/W/DBE subcontracting.

When comparing On-call A&E Payments data to On-call A&E Commitments data to see if there are similar trends, it is revealed that African American-owned participation drops from 15.17 percent based on On-call A&E Commitments to 7.39 based on On-call A&E Payments. Asian American-owned firms show the opposite trend, with 16.38 percent participation based on On-call A&E Commitments and 23.39 percent based on On-call A&E Payments.

For participation by specific MBE group and Caucasian Female-owned firms, Asian American-owned firms had higher participation than African American-owned firms in A&E and Construction, while African American-owned firms were more represented than Asian American-owned firms in Professional Services and Other Services. African American-owned firm participation in Professional Services was significantly higher than all other MWBE groups at 12.37 percent. However, over 60 percent of this participation reflects awards to one African American-owned firm.

Hispanic American-owned firms fared best in Construction at 4.62 percent and Other Services at 3.60 percent. Although their level of participation was greater than the other MBE groups and Caucasian Female-owned firms, it was not significantly so. Caucasian Female-owned firms appear to have the lowest levels of participation, except in Professional Services, where 0.54 percent participation outpaced that of Asian American- and Hispanic

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American-owned firms. D&B MWBEs reflected significant levels of participation in the procurement categories of Construction and Other Services.

| Ethnicity | A&E ^{1,6} | Construction ^{2,5} | Professional Services ^{3,8} | Other Services ^{3,8} | Procurement ^{4,8} |
|--------------------------|--------------------|-----------------------------|--------------------------------------|-------------------------------|----------------------------|
| | % | % | % | % | % |
| Non-M/W/DBE | 61.06 | 75.23 | 84.17 | 77.58 | 97.30 |
| African American | 7.39 | 3.11 | 12.37 | 1.80 | 0.23 |
| Asian American | 23.39 | 3.65 | 0.19 | 1.14 | 0.29 |
| Hispanic American | 1.37 | 4.62 | 0.37 | 3.60 | 0.81 |
| Total MBE | 32.15 | 11.38 | 12.93 | 6.54 | 1.33 |
| Caucasian Female | 2.45 | 2.02 | 0.54 | 0.12 | 0.03 |
| Total M/W/DBE | 34.60 | 13.39 | 13.47 | 6.65 | 1.36 |
| D&B MWBE | 4.35 | 11.38 | 2.36 | 15.77 | 1.35 |
| Total | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 |

Source: BART Purchasing, BART PeopleSoft Financial Management Information System; M³ Consulting

¹ Relevant Market = MSA

² Relevant Market = Bay Area

³ Relevant Market = State of California

⁴ Relevant Market = Nationwide

⁵ Contract Awards data

⁶ On-Call Commitment data

⁷ Accounts Payable data

⁸ Purchase Orders data

Table E.7.
Architecture and Engineering
Pure Prime + Sub Contract—PDC On-call Payments, Detailed
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| | MSA* | | | | | | | | | |
|----------------------|-------------------|---------------|-------------------|---------------|---------------------|---------------|---------------------|---------------|------------------------|---------------|
| | Pure Prime + Sub | | Pure Prime Only | | Subcontractors Only | | Federal Prime + Sub | | Nonfederal Prime + Sub | |
| Ethnicity | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 59,019,734 | 61.06 | 34,721,756 | 58.71 | 24,297,977 | 64.76 | 26,541,208 | 60.52 | 32,478,525 | 61.50 |
| African American | 7,142,603 | 7.39 | 2,952,491 | 4.99 | 4,190,112 | 11.17 | 6,555,424 | 14.95 | 587,180 | 1.11 |
| Asian American | 22,609,351 | 23.39 | 15,911,699 | 26.90 | 6,697,652 | 17.85 | 4,347,004 | 9.91 | 18,262,347 | 34.58 |
| Hispanic American | 1,322,732 | 1.37 | 1,140,424 | 1.93 | 182,308 | 0.49 | 182,308 | 0.42 | 1,140,424 | 2.16 |
| Total MBE | 31,074,686 | 32.15 | 20,004,614 | 33.82 | 11,070,072 | 29.51 | 11,084,735 | 25.28 | 19,989,951 | 37.85 |
| Caucasian Female | 2,367,152 | 2.45 | 1,287,444 | 2.18 | 1,079,709 | 2.88 | 2,025,683 | 4.62 | 341,469 | 0.65 |
| Total M/W/DBE | 33,441,839 | 34.60 | 21,292,057 | 36.00 | 12,149,781 | 32.38 | 13,110,419 | 29.90 | 20,331,420 | 38.50 |
| D&B MWBE | 4,202,529 | 4.35 | 3,131,190 | 5.29 | 1,071,339 | 2.86 | 4,202,529 | 9.58 | 0 | 0.00 |
| Total | 96,664,101 | 100.00 | 59,145,004 | 100.00 | 37,519,097 | 100.00 | 43,854,156 | 100.00 | 52,809,945 | 100.00 |

Source: BART Procurement, M³ Consulting,

*MSA—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo

**Table E.8.
 Construction
 Pure Prime + Sub Contract Awards—Detailed
 San Francisco Bay Area Rapid Transit District
 Relevant Market, 2011 – 2014**

| Ethnicity | Bay Area* | | | | | | | | | |
|----------------------|--------------------|---------------|--------------------|---------------|--------------------|---------------|---------------------|---------------|------------------------|---------------|
| | Pure Prime + Sub | | Pure Prime Only | | Subcontractor Only | | Federal Prime + Sub | | Nonfederal Prime + Sub | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 369,822,861 | 75.23 | 301,152,333 | 89.53 | 68,670,528 | 44.23 | 65,832,363 | 68.95 | 303,990,498 | 76.74 |
| African American | 15,296,069 | 3.11 | 234,500 | 0.07 | 15,061,569 | 9.70 | 2,695,633 | 2.82 | 12,600,436 | 3.18 |
| Asian American | 17,932,277 | 3.65 | 262,530 | 0.08 | 17,669,747 | 11.38 | 6,290,475 | 6.59 | 11,641,802 | 2.94 |
| Hispanic American | 22,699,984 | 4.62 | 2,352,622 | 0.70 | 20,347,361 | 13.11 | 4,301,848 | 4.51 | 18,398,136 | 4.64 |
| Total MBE | 55,928,330 | 11.38 | 2,849,652 | 0.85 | 53,078,677 | 34.19 | 13,287,956 | 13.92 | 42,640,374 | 10.76 |
| Caucasian Female | 9,906,681 | 2.02 | - | 0.00 | 9,906,681 | 6.38 | 3,033,670 | 3.18 | 6,873,011 | 1.74 |
| Total M/W/DBE | 65,835,011 | 13.39 | 2,849,652 | 0.85 | 62,985,358 | 40.57 | 16,321,626 | 17.10 | 49,513,385 | 12.50 |
| D&B MWBE | 55,938,248 | 11.38 | 32,351,458 | 9.62 | 23,586,789 | 15.19 | 13,320,639 | 13.95 | 42,617,609 | 10.76 |
| Total | 491,596,120 | 100.00 | 336,353,443 | 100.00 | 155,242,675 | 100.00 | 95,474,628 | 100.00 | 396,121,492 | 100.00 |

Source: BART Procurement, M³ Consulting,

*Bay Area—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Napa, Solano, Sonoma

BART's utilization data suggests that BART has been able to achieve significant levels of utilization of DBEs on Federally funded contracts, utilizing different techniques and not solely relying on race and gender-conscious goals to do so. As stated previously, based on the findings of its 2009 disparity study and Proposition 209, BART has only been able to apply race and gender-conscious goals to Federal Construction activity. This activity represents only about 20 percent of Construction dollars in the relevant market and slightly less than 10 percent of total dollars in the relevant market. Any M/W/DBE participation achieved outside of these dollars, would have been achieved through race and gender-neutral means.

The procurement area of most note in this regard is A&E, whose overall levels of M/W/DBE participation outpaced that of Construction. Given that Planning, Development and Construction and Maintenance and Engineering, along with the Procurement Department, are responsible for both A&E and Construction services, the procurement techniques and the contracting vehicles utilized may have a significant influence on outcomes:

- A&E services—which includes Architecture and Engineering, Construction Management, Environmental Services and other Design and Construction-related Professional Services—are considered a Professional Service and are procured using Requests for Proposal. For A&E Agreements, BART relies heavily on the contract vehicle of Indefinite Quantity Contracts (IDIQ) on a Cost-Plus basis. These procurement and contract vehicles provide more discretion in decision-making at both the prime and subcontracting levels.
- Construction, on the other hand, is primarily procured using Invitation to Bid (ITB) for all Construction projects over \$10,000, consistent with State of California law. ITBs are procured on lowest responsible and responsive bid, unless a two-step bidding process is utilized.

Further, it appears that the majority of M/W/DBE participation in Construction is found at the subcontracting level, with little participation of M/W/DBE firms as prime contractors. In contrast, on A&E, participation proportions reflect M/W/DBE commitments at both the prime and subcontracting levels. When comparing Construction Thresholds from \$0 to \$1.5 million, using Pure Prime + Subcontract Award data and Purchase Orders data, which is Prime level activity only, the differences are stark. Based on Prime Award Purchase Order data, M/W/DBE participation did not exceed 2.36 percent in any threshold. Given the levels of participation achieved at the subcontracting level of almost 40 percent, with significant participation in thresholds between \$0 and \$1.5 million, this prime level performance suggest that BART views the achievement of race and gender-conscious goals as a subcontracting requirement under ITBs, due to the low bid requirement. If such a view is indeed held by

BART (and other public and private entities in the Bay Area), and procurement interviews suggest that it may well be, this perspective/bias could have a significant influence on the capacity of M/W/DBEs to grow and develop in the Bay Area. Additionally, while M/W/DBEs have shown that they are capable of satisfactorily performing subcontracts of significant value and size, State of California bonding insurance and financing required for Public Works contracts affects the ability of many M/W/DBE firms to bid as prime contractors on similarly sized contracts.

Given that specialization is a factor to be considered across all procurement categories, lower levels of participation in other procurement categories—Professional Services, when outliers are adjusted for, Other Services and Procurement—may reflect a lack of organizational focus on inclusive efforts that promote M/W/DBE participation in these areas.

D. Disparity Analysis

Table E.9 summarizes the disparity ratios discussed in this chapter for each procurement categories at the race/ethnic/gender group level, for BART procurements for the study period 2011–2014. Based on the foregoing analysis and the summary below, findings of statistically significant disparity are made for the following groups in the following procurement categories:

- Architecture and Engineering—African American-owned firms, Hispanic American-owned firms, Caucasian Female-owned firms;
- Construction—African American-owned firms, Asian American-owned firms, Hispanic American-owned firms, Caucasian Female-owned firms;
- Professional Services—Asian American-owned firms, Hispanic American-owned firms, Caucasian Female-owned firms;
- Other Services—African American-owned firms, Caucasian Female-owned firms;
- Procurement—African American-owned firms, Asian American-owned firms, Caucasian Female-owned firms.

Table E.9.
Summary Disparity Ratios by Race, Ethnicity and Gender
Utilization vs. RWASM Availability Level 3
San Francisco Bay Area Rapid Transit District
Relevant Market; FY 2011-FY 2014

| Ethnicity | A&E (On-call Payments) | | Construction (Contract Awards) | | Professional Services (Purchase Orders) | | Other Services (Purchase Orders) | | Procurement (Purchase Orders) | |
|----------------------|---------------------------|----------|-----------------------------------|----------|--|----------|-------------------------------------|----------|----------------------------------|----------|
| | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. |
| Non-M/W/DBE | 0.98 | S | 1.12 | S | 1.02 | S | 0.93 | S | 1.04 | S |
| African American | 0.97 | S | 0.64 | S | 3.12 | S | 0.48 | S | 0.27 | S |
| Asian American | 2.27 | S | 0.56 | S | 0.08 | S | 1.65 | S | 0.35 | S |
| Hispanic American | 0.35 | S | 0.67 | S | 0.15 | S | 2.63 | S | 1.37 | S |
| Total MBE | 1.43 | S | 0.62 | S | 1.47 | S | 1.12 | S | 0.59 | S |
| Caucasian Female | 0.33 | S | 0.45 | S | 0.18 | S | 0.09 | S | 0.04 | S |
| Total M/W/DBE | 1.16 | S | 0.58 | S | 1.13 | S | 0.92 | S | 0.46 | S |
| D&B MWBE | 0.55 | S | 1.16 | S | 0.43 | S | 1.70 | S | 0.39 | S |

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M³ Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;
 Significance is NS and Ratio is Greater than 1—Over utilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically Significant;
 ND: Not Defined

E. Capacity Issues

As disparities in procurement and contracting are often attributed to differences in capacity of Non-M/W/DBE and M/W/DBE firms, the capacity analysis sought to examine if there were any differences in capacity of firms based on race or gender that impact disparity outcomes and could hinder firms from being actually and potentially available to BART. Because the pool of 76 firms that have actually contracted with BART is too small to draw definitive conclusions, M³ Consulting can only conduct an analysis on the pool of total respondents that include potential and actually available firms. Therefore, this analysis does not support drawing conclusions on any disparity outcomes since the sample of respondents is too small to generalize toward the population of all firms. Moreover, on important questions that discussed contracts and awards, the response rate was even smaller overall.

Even so, M³ Consulting was able to draw some conclusions from the various capacity analysis conducted. Based on D&B, there is little difference in capacity based on number of employees and revenues among the race/gender/ethnic groups in the Bay Area.

- To analyze capacity of S/M/W/DBEs compared to Non-M/W/DBEs, M³ Consulting conducted a survey of vendors that registered to do business with BART and examined the differences in capacity by race/gender/ethnic groups. Some summary highlights from the survey are as follows:
 - On average, majority women-owned firms are statistically significantly younger, but do not have significantly lower start-up capital as well as gross receipts.
 - There is also no significant difference in the number of times women-owned firms apply for a bond than their male counterparts but women-owned firms are denied a bond significantly fewer times on average. Similarly, MBEs apply almost half the times than Non-M/W/DBEs apply for bonds and loans/lines of credit, but get denied significantly more often.
 - Women-owned firms, including Caucasian Female-owned firms are denied more often on loans or lines of credit, although this difference is not statistically significant.
 - MBEs and WBEs have significantly fewer full time employees and are younger on average than Non-M/W/DBEs.
 - While start-up monies are not significantly different between the groups, the gross receipts between MBEs and WBEs are significantly smaller than Non-M/W/DBEs.
- After accounting for variables that may impact revenues of firms, race/gender/ethnicity of the firm's owner does not seem to have any influence, with the exception of Caucasian Female ownership, wherein they seem to positively influence revenues. Any variation in revenues of African-American owned, Hispanic American-owned and Asian American-owned firms from similarly situated Non-M/W/DBEs was purely due to chance.
- Examining the factors that impact the self-employment decision, it is noted that comparing similarly situated individuals (in terms of economic and demographic variables), in the State, a non-minority male is 1.87 times more likely to be self-

employed as an African American, 1.62 times as likely as an Asian American, about 1.15 times as likely as any Other Race and only little over half as likely as a Hispanic American to be self-employed. Also, women are half as likely as men to be self-employed.

- Further examining the likelihood of self-employment based on race and gender characteristics, controlling for variables related to economic and demographic factors, we find that compared to non-minority male, Asian American-owned and African American-owned firms and Women-owned firms are significantly less likely to be self-employed in California, whereas Hispanic Americans are significantly more likely to be self-employed. Also, consistent with the literature, those in the Construction industry appear to have more self-employment. Examination of the construction industry shows consistent results.
- Examining the factors that impact self-employment earnings, we note that all other variables kept constant, a self-employed Hispanic American will earn about \$960 more than a non-minority firm; a self-employed African American will earn about \$1,546 less, an Asian American will earn about \$1,535 less and a female will earn \$1,803 less than a male, if self-employed.

While capacity differences do not appear to be distinct in the size of the firms based on revenues or full time employees based on race/gender or ethnicities, the constraints in capacities are more notable in business formation and factors related to the self-employment decision and earnings which include denials in bonds and loans/lines of credit.

E.3.3 QUALITATIVE FINDINGS IMPACTING STATISTICALLY SIGNIFICANT DISPARITY

A. Procurement

1. Procurement Process

BART operates in a fairly decentralized procurement environment, with sponsor departments having significant input on the “buy” decision in many instances. The decentralization is particularly evident in the procurement area of A&E, where the utilization of On-call (Indefinite Quantity contracts) provides Planning, Development and Construction significant control over the manner in which dollars are expended post-award through the execution of work plans. It is important to note that decentralized procurement alone is not the primary concern, but whether there is sufficient infrastructure support and

organizational oversight to ensure transparency, accountability, efficiencies and above all, fairness and inclusiveness on an on-going basis.

On procurements that it does not directly procure, the Procurement Department serves in a mostly administrative role, particularly as it relates to change orders and work plans executed against IDIQs. In so doing, BART's procurement objectives of creating an inclusive, efficient, fair and open procurement process are sometimes secondary to providing Sponsor Department's the greatest degree of flexibility in achieving their departmental objectives. That flexibility has supported, in some instances, the ability of BART project managers, to continuously select favored firms through the work plan process in A&E. In other areas where the Procurement Department does directly procure, including Construction, BART's procurement process does not reflect an effort to include M/W/DBEs at the prime level on either formal or informal purchases. M/W/DBE participation is viewed as a Senior Management mandate, as opposed to a component of inclusive public sector procurement. M³ Consulting formulated barriers within the procurement system into the following areas:

- Lack of integration of diversity and inclusion throughout BART Strategic Plan minimizes organizational focus on achievement of DBE, SB and MWBE inclusion in BART opportunities as a policy objective.
- Decentralized procurement function without strategic oversight reduces BART's ability to develop an inclusive and sustainable procurement operation; lack of enterprise resource planning (ERP) integration further exacerbates problems caused by decentralization.
- Minimal procurement forecasting reduces BART's ability to engage in effective planning to meet BART's strategic mission of "economic prosperity" and to achieve inclusive procurement through its procurement opportunities.
- Underdeveloped vendor registration impacts BART's ability to effectively identify DBEs, SBs and MWBEs "ready and willing" to bid on BART opportunities, as well as reduces BART's ability to establish tailored project goals.
- While sealed bid and RFP processes are consistent with industry practice, over-reliance on broad on-call contracts and lack of price caps reduces BART's ability to ensure inclusiveness and sustainability in levels of M/W/DBE participation in these procurements.
- BART's approach to the issue of contractor/consultant substitutions reflects an organizational culture that is overprotective of prime vendor rights to the detriment of BART's rights, which includes BART's strategic mission, as well as subcontractors/subconsultants on BART projects.

- While BART's General Manager has exhibited leadership in promoting DBE, SB and MWBE participation through race-neutral programmatic initiatives and community outreach, the effectiveness of these initiatives are lessened by the issues outlined above, leading to greater organizational inefficiencies.

2. Data Infrastructure Challenges

Issues resulting from unchecked decentralization are greatly compounded by issues related to BART's data infrastructure. Given the size and complexity of many of BART's A&E and Construction contracts, some over \$300 million, a combination of decentralization and data systems limitations can mask operational issues that may have become discriminatory and exclusionary. As such, these factors can impact the accurate reporting of BART awards, commitments and payments, as required by 49 CFR Part 26, and the monitoring and reporting that the California courts¹¹ have deemed allowable and appropriate under Proposition 209. We note that in an Equal Employment Opportunity environment, such inability to provide accurate and complete reporting on key decision-making impacting hiring, promotions and termination in and of itself could result in a finding of adverse impact. The procurement and DBE (federal) and MWBE (principally state and local) regulatory environment has not kept pace with EEO. Key data issues are summarized below:

- BART only implemented an online vendor portal in January 2016. Currently, only RFPs are available on-line. Previously, for notification of opportunities and solicitation, BART procurement specialists and buyers relied principally on individual lists of firms that each had developed.
- BART's bidder and sub-bidder data on formal contracts is maintained in hard-copy formats, as well as any written quotes solicited. Telephone quotes are not always recorded in any electronic formats. Furthermore, BART does not collect requisite data on a consistent basis, including age of firm and annual gross receipts for bidders and sub-bidders (and quotes) as required under 49 CFR Part 26.11. In 2013, OCR attempted to begin compliance with the data collection requirements of 49 CFR Part 26, however, such an effort requires collaboration with Procurement. BART does not have a system for collecting prime contractor's sub-bidder data. Data needed on a semi-annual basis to report DBE participation to FTA is performed through a manual data collection process.
- BART's award data is maintained in hard-copy formats in Procurement's bid files. OCR attempted to collect prime and subcontractor award and commitment data

¹¹ See *Hi-Voltage v. San Jose*, 101 Cal Rptr. 653, 671 (2000) and *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16 (2001).

directly from BART's prime vendors through the Vendor Payment Tracking System, but this effort has not produced reliable information.¹² Prime vendor commitment data is available from the PeopleSoft Financial Management system. Subcontractor commitment data is potentially available through PeopleSoft in PDF invoices that may or may not reflect detailed subcontractor data.

- Because of BART's reliance on IDIQs cost plus contract vehicles (on-call contracts) for much of its A&E activity, BART's data systems can not accurately capture award and commitment data for A&E, as both are considered budgetary figures only. Definite quantities for A&E can be determined only at the point of payment at both the prime and subcontractor levels. OCR's Vendor Payment Tracking System does not include work plan data against the IDIQs. Only PDC's work plan summaries and invoices contain prime and subcontractor commitment (budget) and payments data.
- Payments data is maintained at the prime vendor level in the PeopleSoft financial management system. Subcontractor data may be gleaned through a manual effort from PDFs of invoices attached in PeopleSoft system. Subcontractor payments are maintained in disparate systems utilized by project managers in sponsor departments and resident engineers. OCR attempted to collect subcontractor payments through the Vendor Payment Tracking System. However, lack of systems integration impacts the reliability of this data system.
- These hard-copy, online and electronic databases are not integrated, thus limiting the depth of analysis that BART can conduct on the impact of its annual spend decisions on DBE, SB and MWBE participation, as well as BART's overall impact on economic development in the Bay Area. Furthermore, BART is not positioned to report on DBE, SB and MWBE participation in real-time, which reduces its ability to quickly respond to changes in DBE, SB and MWBE levels of participation on its contracting activity, until well after procurement spend has occurred, and often, after payment has already been made. Lastly, because complete and detailed procurement data is not available in easily retrievable formats, reporting to FTA on DBE participation on a semi-annual basis requires a significant data collection effort by OCR from different BART departments and data collection for disparity studies performed every five years is laborious, costly, and quickly outdated. Because OCR reports on the inclusiveness of the "buy" decisions made by Procurement and Sponsor Departments, it is dependent on the effectiveness and efficiency of data recorded by procurement decision-makers.

¹² As discussed in Chapter 4: Statistical Methodology, in a comparison of contract information by individual Contract ID, M³ Consulting was unable to match a significant number of contract and subcontract values reflected in the VPTS data to other sources of data, ie On-call data, Purchase Order data, Payments data and Contract awards data. Given that VPTS is designed to simply be a "storehouse" of information from these other sources, VPTS data should directly match contract values in these sources.

- This lack of procurement consistency, and its effect on perceived lack of accountability and transparency also compromises BART's ability to respond to community concerns in a manner that builds trust and goodwill.

A sound procurement system and data infrastructure is critical to meeting the spirit and intent of *Richmond v. Croson*. The U.S. Supreme Court did not intend for race and gender-conscious remedies to become permanent fixtures for public entities. Instead, these remedies should be utilized only when needed. Without adequate insight into organizational decision-making regarding procurement in real-time, BART does not have the flexibility to utilize this "tool" in an as-needed manner, quickly responsive to a changing, organic procurement process. Additionally, if the California courts do indeed identify a set of facts requiring the utilization of race and gender-conscious remedies on non-federal procurement, this flexibility may also be a key requirement to addressing the courts' and voters' concerns on the utilization of such remedies as expressed in Proposition 209.¹³

B. Anecdotal

The anecdotal data from 49 participants was gathered through a series of 22 one-on-one in-depth interviews and five focus groups, which included 27 participants. Those interviewed included both minority and women business owners, as well as non-minority male business owners. The objective of the in-depth interviews was to capture the experiences, attitudes, issues, and perceptions of business owners seeking opportunities with BART, and with other public and private organizations in the San Francisco Bay area.

The anecdotal testimony tended to reflect the impact of BART's bureaucracy on the ability of DBEs, SBs and MWBEs to do business with the agency in a fair and open manner. Interviewees expressed concerns about the perceived large size of contracts, the repeated use of the same firms, BART's preference for large firms over DBEs, SBs and MWBEs, excessive red tape, and the unfair cancellation of contracts to DBEs, SBs and MWBEs, as well as the unwillingness to award to DBE, SB and MWBE at the prime level.

Interviewees also revealed perceived unfair practices by prime contractors including lack of serious consideration provided at matchmaking sessions, excessive bonding and insurance requirements for subcontractors, unwillingness to contract with DBEs, SBs and MWBEs listed on winning bid (being dropped after contract award), and derogatory comments and attitudes utilized. The contracting issues voiced by interviewees require more investigation

¹³ See *Coral Construction, Inc. v. City and County of San Francisco*, 50 Cal.4th 315 (2010).

by BART to determine whether Public Contract Code 4100, Fairness in Subcontracting and Subletting, is being violated as it relates to BART specific public works contracts.

The impact of the 2008 recession and Proposition 209 was also discussed by interviewees. These events have resulted in a decline in the number of DBEs, SBs and MWBEs in the Bay Area. The growth and development of these firms is also being impacted by the unavailability of skilled employees.

C. Private Sector

The local demographics in the San Francisco-Oakland-Fremont MSA includes about 54 percent Whites, a little over 19 percent Hispanic/Latino Americans and Asian Americans each, less than 8 percent African Americans. Of those persons who are in the labor force, Hispanic Americans in the San Francisco-Oakland-Fremont MSA were represented to a greater degree, with 70.6 percent of the total Hispanic population participating in the labor force, compared to 67.6 percent of the White population. African Americans had the lowest level of participation in the labor force at 61 percent of the African American population, followed by Asian Americans at 66.0 percent.

It is expected that the differences in the availability of firms in the relevant market would be representative of these statistics. As such, it is important to study the degree to which the population is gaining education and experience that could lead to business formation. Because of the intense focus on inclusion of DBEs, MWBEs and SBs in construction by many public agencies, we focus here in these Private Sector Conclusions on that industry.

Among all racial and ethnic groups, Hispanic Americans have the greatest employment presence in construction in the San Francisco-Oakland-Fremont MSA, at 47.8 percent of Construction and Extractive Craft Workers and 52.3 percent of Laborers and Helpers. Asian Americans have some representation in all areas of construction, whereas African Americans have a relatively small presence in construction. Even so, in actual BART Construction availability and utilization, Hispanic American-owned firms do not significantly outpace other M/W/DBE proportions.

Further evidence of DBE and MWBE participation and penetration within the construction marketplace was obtained from Reed Elsevier (Reed), which is a private firm that surveys construction-related activity in various regions around the United States. The San Francisco-Oakland-Fremont MSA and the San Jose-San Francisco-Oakland CSA regions were reported for this disparity study. Reed bid and award data indicates that DBEs and MWBEs within

the San Francisco-Oakland-Fremont MSA appear to obtain few construction sector projects, even in subcontracting opportunities. The Reed data is self-reported.

A more telling picture on M/W/DBE participation in the private sector emerges from a review of City and County of San Francisco Building Permits data.¹⁴ Over 95 percent of building permits, based on counts, were issued to Non-M/W/DBEs, compared to 80 percent in the public sector. Based on actual dollar values of these building permits, almost 98 percent went to Non-M/W/DBEs in both the Private and Public sector. Even when broken down into threshold categories, starting with \$0-50,000, Non-M/W/DBE participation was between 95-99 percent in the different categories. Despite earlier evidence from Census EEO data that Hispanic American dominated the construction industry occupations, in the public sector, no permit was issued to any Hispanic American-owned firm represented on the Master S/M/W/DBE certification list and only 0.01 percent and 0.3 percent of issued permits were awarded to African American-owned firms and Asian American-owned firms, respectively. Caucasian Female-owned firms were issued 0.01 percent of public sector building permits.

Of the top 20 awardees of building permits for the FY 2010-15, a total of three D&B MWBE firms from the Master S/M/W/DBE certification list are among the top 20 awardees that received building permits. None of the three were among the RWASM firms within the relevant market for BART.

D. Race Neutral

M³ Consulting reviewed over 100 Management, Financial and Technical Assistance providers, along with Chambers of Commerce and other networking organization, in San Francisco, Alameda and Contra Costa County. Further, 18 Executive Directors were interviewed. Key concerns expressed by these leaders were as follows:

- Proposition 209 reduced the availability of contracting opportunities and reduced contracting activity to MWBEs;
- MWBEs have a very difficult time obtaining loans, especially African Americans. Some of the reasons cited are lack of resources, bad credit decisions, and generational poverty;

¹⁴ This did not include Alameda County and Contra Costa since the former was unresponsive and the latter sent data in unusable formats. Thus, these two counties were not included in the data presented.

- The lack of access to decision makers who award contracts prevents MWBEs from obtaining business and growing their firms;
- Lack of access to and participation in management, technical and financial assistance programs;
- Unwillingness of prime contractors to utilize MWBEs, unless required to do so by governmental agencies.

M³ Consulting found that, while these organizations had some impact on improving DBEs, SBs and MWBEs management skills, access to capital, and greater exposure to the larger business community, DBEs, SBs and MWBEs still face difficulty in gaining access to public and private sector contracting opportunities. Additionally, while there have been some efforts to address capacity in the Bay Area and BART has seen slight increases in DBEs, SBs and MWBEs participation in contract awards in some industry categories, in general, the slow growth in increased capacity remain an issue. While race and gender-neutral efforts may have contributed in some degree to increased capacity and participation in contract awards, race and gender-neutral programs alone have not been fully effective in increasing availability, capacity or utilization of DBEs, SBs and MWBEs.

E.4 RECOMMENDATIONS

Based on the foregoing findings and conclusions, M³ Consulting developed recommendations to address the factors creating the disparity. An overview of the recommendations is provided in Section E.3 of this Executive Summary and in detail in Chapter 12, Conclusions and Recommendations.

The recommendations below include both race and gender-conscious and race and gender-neutral recommendations. These conclusions and recommendations should assist the BART Board of Directors and BART Staff to determine whether the disparity rises to a level of discrimination warranting the utilization of race and gender-conscious remedies within the parameters of the U.S. Supreme Court's *Richmond v. Croson* decision and its progeny, including *Western States Paving v. Washington DOT*, decided by the 9th Circuit, along with 49 CFR Part 26 and Proposition 209.

If BART chooses to continue to utilize some form of a race and gender-conscious program, it will need to meet the U.S. Supreme Court requirements of *Richmond v. Croson*. Narrow tailoring is the crucial element in crafting appropriate *Croson* remedies. Courts, have struck down many MWBE programs due to the failure of local jurisdictions to narrowly tailor their

remedies Once a factual predicate has been established, post-*Crosbon* case law presents several broad guidelines for crafting recommendations for MWBE programs by a public entity, based on the factual predicate findings.

- Race and gender-conscious MWBE programs should be instituted only after, or in conjunction with, race/gender-neutral programs.
- MWBE programs should not be designed as permanent fixtures in a purchasing system without regard to eradicating bias in standard purchasing operations or in private sector contracting. Consequently, each MWBE program should have a sunset provision, as well as provisions for regular review. Additionally, there is the implication that reform of purchasing systems should be undertaken.
- MWBE programs should have graduation provisions for the MWBEs that have largely overcome the effects of discrimination and no longer are in need of a remedy.
- Rigid numerical quotas run a greater risk of being overturned by judicial review than flexible goals.
- Race and gender-conscious goals, if any, should be tied to MWBE availability and to addressing identified discrimination.
- MWBE programs should limit their impact on the rights and operations of third parties.
- MWBE programs should be limited in scope to only those group(s) and firms that suffer the on-going effects of past or present discrimination.

These measures are designed to address the underlying systemic factors that contributed to the disparity in contracting. In light of the findings and conclusions above, M³ Consulting is providing the following recommendations to BART.

E.4.1 BART ORGANIZATIONAL RECOMMENDATIONS

BART enjoys forward looking leadership and a mission that matters as it relates to Equity and Inclusion. In order to build upon this advantage, below is a summary of recommendations to BART for organizational, cultural, structural and programmatic changes that will lead to inclusive, transformative and sustainable change in BART's

procurement operations and that will bring BART into regulatory compliance and alignment with best practices. These recommendations are largely race and gender-neutral.

- 1. Change inclusion focus from programmatic (compliance with DBE regulations) to organizational (commitment to inclusive procurement environment)**
 - a. Identify BART's inclusive procurement objectives
 - b. Connect BART's inclusive procurement objectives, strategies, tactics and tasks to BART strategic mission, which includes community economic development, equity and inclusion objectives

- 2. Recognize that planning and procurement are often the first steps in actualizing the Board's Strategic Mission, particularly as it relates to community economic development**

- 3. Determine procurement operational structure that ensures reporting to the Board of Directors and General Manager on**
 - a. Manner in which procurement spend has met the strategic mission and policy objectives established by the Board of Directors and General Manager
 - b. Targets and goals met by the entire organization
 - c. Procurement techniques and contracting vehicles that best meet the mission and objectives established by the Board of Directors and General Manager
 - d. Remember: The Office of Civil Rights is the Advocate; OCR does not make the "Buy Decision" and thus, cannot be solely accountable to the Board for the organization's performance on inclusive procurement.

- 4. Promote greater transparency and accountability in procurement and post-award contract activity**
 - a. Develop fully integrated data systems that address procurement, project management, OCR and accounts payable requirements
 - i. To maximize transparency of procurement decision-making
 - ii. To ensure compliance with requirements of 49 CFR Part 26
 - iii. To allow for greater planning consistent with strategic mission and policy objectives
 - iv. To allow BART staff to respond real-time to inclusion/exclusion issues
 - b. Review procurement methods and contract vehicles utilized to ensure transparency and accountability on decision-making pre- and post-award
 - c. Monitor contracts for issues of overconcentration

5. **Ensure that Decision-Making within BART can be monitored, using an EEO Applicant Flow model equivalent**
 - a. Develop ability to track procurement spend in a manner that highlights decision-making points (selection, evaluations, contract changes) to ensure decisions by BART and its prime contractors/prime consultants are being made in a non-discriminatory manner. RWASM and Disparity Analysis tracking and compliant reporting should include the following:
 - i. Potential Availability from D&B Firms, Firms Receiving Building Permits and/or Business License, certified DBE, SB and MWBE firms, non-certified DBE, SB and MWBE firms, trade organization membership; on-line data bases
 - ii. Registered Vendors, Plan Holders, Pre-Qualified Vendors
 - iii. Bidders and Sub-bidders (inclusive of quotes)
 - iv. Awardees and Payees and Sub-awardees and Sub-payees
 - v. Difference between prime and subcontracting opportunities; vendor performance
 - vi. Contract terminations, for convenience and for cause; subcontractor substitutions
6. **Develop “development-based” inclusion programs based on 7 Stages of DevelopmentSM**
 - a. Planning
 - b. Financing
 - c. Designing
 - d. Construction
 - e. Equipping
 - f. Maintaining
 - g. Operating
7. **Promote prime level participation**
 - a. Identify prime-level procurement opportunities where a significant pool of DBEs, SBs and MWBEs are available
 - b. Establish prime-level participation targets (federal only)
 - c. Increase the utilization of SB set-asides and sheltered market opportunities
 - d. Advertise small business opportunities
 - e. Review pool of DBE, SB and MWBE sub-bidders and subcontractors to determine those ready for prime level awards
 - f. Utilize bid rotation on IDIQs

- g. Unbundle contracts into commercially viable units
- h. Optimize joint ventures, mentor/protégé, distributorships

E.4.2 BART DBE, SBE and SB Recommendations

Further recommendations include augmenting BART's DBE, SBE and SB program operations by developing effective outreach and matchmaking programs; maximizing the utilization of small business and sheltered market programs; developing effective bonding and insurance assistance programs; developing processes for certifying and tracking joint ventures, mentor-protégé and distributorships; and developing working capital and paymaster programs with Financial Assistance Providers.

E.4.3 UTILIZATION OF RACE AND GENDER-CONSCIOUS GOALS

In certain categories and for certain groups, race/gender-conscious means are supportable activities toward the achievement of established goals, based on the findings of statistically significant disparity. These categories are repeated here for convenience and include:

| Table E.10. Categories for Race/Ethnicity/Gender-Conscious Means of Addressing Disparity By Procurement Type By Federal/Non-Federal | | | |
|--|---|---|---|
| Procurement Areas | Overall | Federal | Non-Federal |
| A&E | <ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females |
| Construction | <ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females |
| Professional Services | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females |
| Other Services | <ul style="list-style-type: none"> • African Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Caucasian Females | <ul style="list-style-type: none"> • Hispanic Americans • Caucasian Females |
| Procurement | <ul style="list-style-type: none"> • African Americans • Asian Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Asian Americans • Caucasian Females |

Source: M³ Consulting

As significant disparity is eliminated in the above categories, the utilization of race and gender-neutral means in attaining the established goals should be increased. However, in all instances where race and gender-neutral means are utilized, if significant disparity re-emerges, then race and gender-conscious techniques can be utilized on a non-permanent basis to correct identified disparities. Given the recommendations regarding data capture, these categories should be closely monitored, as BART implements the procurement and organizational recommendations above, which may result in changes in disparity findings.

E.5 SUMMARY

In summary, it is reiterated that Miller³ Consulting, Inc. found that BART purchasing activities suggest that DBEs, SBs and MWBEs continue to have some difficulties obtaining significant contracts with BART. In submitting specific findings within the Disparity Study for BART, M³ Consulting formulated recommendations that allow BART to rely upon race and gender-conscious means when necessary to address ongoing hindrances to eliminating disparities, while also addressing DBE, SB and MWBE participation through race and gender-neutral efforts. Our economic and statistical utilization analyses could serve as part of the policy and procedure-making decisions needed to ensure enhanced and legally defensible DBE, SB and MWBE participation in BART's purchasing processes.

CHAPTER 1: INTRODUCTION**1.1 SCOPE OF THE DISPARITY STUDY**

On May 18, 2015, the San Francisco Bay Area Rapid Transit District, or BART, commissioned Miller³ Consulting, Inc. (M³ Consulting) to conduct a Disparity Study (the Study). In conducting this Study, M³ Consulting collected and developed data to determine disparities, if any, between the availability and utilization of small, minority, woman and disadvantaged-owned businesses for contracts awarded by BART. The Study involved the following areas of analysis:

- Collection and analysis of historical purchasing, contracting records and levels of DBE, SBE, and MWBE participation covering the Study period FY 2011-FY 2014 for BART in the procurement categories of architecture & engineering, construction, professional services, procurement and other services;
- Compilation of bidder, vendor, DBE, SBE, and MWBE certification and other lists to determine relative availability of contractors and vendors;
- A market survey analysis to determine capacity;
- An assessment of procurement and federal DBE and SBE, and non-federal Non-Discrimination and SB policies and procedures that included the following: an analysis of the organizational structures of BART; a review of past and present purchasing, as well as federal DBE and SBE, and non-federal Non-Discrimination and SB laws, policies, procedures and practices; and interviews with Procurement and Office of Civil Rights (OCR) personnel;
- Anecdotal interviews and surveying of minority, women and Non-M/W/DBE business owners;
- Examination of Non-M/W/DBE and DBE, SBE, and MWBE participation in the private sector in BART's market areas; and
- Analysis of race and gender neutral alternatives to minority and women business goal-based programs.

This Disparity Study Update contains the results of M³ Consulting's research and provides conclusions based on our analyses.

1.2 ORGANIZATION OF THE DISPARITY STUDY

This report consists of two volumes. Volume I includes the Executive Summary and twelve chapters. Volume II contains additional statistical tables and relevant appendices. A brief description of each chapter is outlined below.

- **Chapter I – Introduction** includes a synopsis of the contents of each chapter.

1.2.1 Industry Analysis

- **Chapter II – Legal Analysis** presents a discussion of the *City of Richmond v. J.A. Croson* decision and lower court cases interpreting and applying the *Croson* decision, including a discussion of the United States Court of Appeals for the Ninth Circuit's review of race and gender-conscious programs.
- **Chapter III – Procurement Analysis** reviews BART's Procurement and federal DBE and SBE, as well as its non-federal SB and Non-Discrimination procedures, policies and practices in relation to their effect on DBE, SBE, and MWBE participation.

1.2.2 Statistical Analysis

- **Chapter IV – Statistical Methodology** provides a detailed discussion of the statistical methods used in the Study for determining availability and utilization of M/W/DBEs and in calculating disparity. The chapter begins with a brief review of (a) the relevant market; (b) definition of businesses' *readiness, willingness, ability* and how they affect measurement of availability; (c) measures of utilization and disparity; and (d) statistical significance. This chapter also reviews the task of data collection and includes a summary of data sources relied upon for relevant market, availability, utilization, and capacity determinations.
- **Chapter V – Statistical Analysis of M/W/DBE Availability** presents data on M/W/DBE availability in the relevant market based on the *Ready, Willing and Able (RWASM) Model* and Dun & Bradstreet data.
- **Chapter VI – Statistical Analysis of M/W/DBE Utilization** presents data on M/W/DBE utilization in awards and payments for FY 2011–FY 2014 based on contract awards, accounts payable and purchase order data.

- **Chapter VII – Statistical Analysis of M/W/DBE Disparity in Contracting** presents disparity ratios, which are a comparison of the availability measures in Chapter V and the utilization measures in Chapter VI.
- **Chapter VIII – Capacity and Regression** examines whether firm capacity contributed in any way to the observed disparities. The purpose of this analysis is to determine if, after accounting for any differences in the capacity of firms, race and gender are contributing factors to any disparities found. In addition, access to financing is also analyzed in this chapter through survey data.

1.2.3 Market Analysis

- **Chapter IX – Anecdotal Analysis** includes a description of anecdotal data collected and a synopsis of comments during interviews made by minority, women and Non-M/W/DBE business owners. The interviews focus on personal experiences in conducting business within a specified industry or with BART.
- **Chapter X – Private Sector Analysis** examines DBE, SBE, and MWBE participation in private sector opportunities and factors impacting their growth and development. It includes U.S. Bureau of Census Self-Employment and Apprenticeship data, Census EEO data, local Reed Construction data, and local building permits data.
- **Chapter XI – Race-Neutral Alternatives** analyzes race and gender-neutral programs to determine if they stimulate the utilization of DBEs, SBEs, and MWBEs without reliance upon characteristics of race, ethnicity or gender.

1.2.4 Conclusions and Recommendations

- **Chapter XII – Conclusions and Recommendations** presents conclusions and program recommendations that flow from the findings presented in the report. These recommendations range from race and gender-conscious initiatives for BART to substantive suggestions that pertain to the enhancement of inclusive procurement operations and federal DBE and SBE programs, as well as the implementation of BART's Non-Discrimination and SB program in non-federal contracts, agreements, and procurements.

Introduction

The findings in each of the report's chapters are interdependent. This statistical analysis, when viewed in totality, provides BART with a picture of M/W/DBE participation in contracting and procurement activity involving prime contracts and subcontracts for the period FY 2011-FY 2014.

CHAPTER 2: LEGAL ANALYSIS

2.1 INTRODUCTION

This chapter will review the legal construct governing BART's Disadvantaged Business Enterprise (DBE), Small Business (SB) and Non-Discrimination (ND) Programs. The analysis is intended to be a comprehensive overview of the requirements of *City of Richmond v. J.A. Croson* and its progeny¹⁵ and their application to BART.

The chapter is divided into three sections, with the following subsections¹⁶.

2.2. Constitutionality of Race and Gender-Conscious Programs

2.2.1 *City of Richmond v. J.A. Croson* Analysis

- *Adarand v. Peña*—Strict Scrutiny Applied to Federally Funded Requirements

2.2.2 Judicial Review of DBE and MWBE Programs in the United States Court of Appeals for the Ninth Circuit and the State of California

2.3 Factual Predicate Standards (Conducting the Disparity Study)

2.3.1 Relevant Market vs. Jurisdictional Reach

2.3.2 Availability

2.3.3 Utilization

2.3.4 Disparity Ratios

2.3.5 Capacity and Regression

2.3.6 Anecdotal

2.3.7 Private Sector

2.3.8 Race Neutral

¹⁵ Progeny are legal cases that follow an original opinion setting legal precedent.

¹⁶ This chapter is also supported by Appendix A: Additional Legal Summary, which consists of additional, older cases in the Ninth Circuit and a summary of goal-setting requirements under 49 CFR Part 26.

2.4 Conclusions

2.4.1 *Croson* Standards

2.4.2 Ninth Circuit and State of California

2.4.3 Elements of Factual Predicate

This legal construct is instrumental in determining not only the parameters, but also guiding the analysis of the constitutionality of the BART's current race and gender-conscious initiatives.

2.2 CONSTITUTIONALITY OF RACE AND GENDER-CONSCIOUS PROGRAMS

2.2.1 CITY OF RICHMOND V. J. A. CROSON ANALYSIS

The U.S. Supreme Court set the legal standard for adoption and application of a government race-conscious program in the precedent-setting case *City of Richmond v. J.A. Croson Co.*¹⁷ The following sections of this chapter discuss the *Croson* case and both the United States Court of Appeals for the Ninth Circuit's and the State of California courts' interpretation of the Supreme Court's constitutional analysis of government sponsored race and gender-conscious programs.

Background

In 1983, the City of Richmond, Virginia enacted an ordinance which established a minority business enterprise utilization plan (MBE plan) requiring non-minority-owned prime contractors awarded city contracts to subcontract at least 30 percent of the dollar amount to minority business enterprises. Per the MBE plan, minority business enterprises were defined broadly as companies with at least 51 percent ownership and control by U.S. citizens who were Black, Spanish-speaking, Asians, Indian, Eskimo, or Aleut. Under this definition, the MBE plan had no geographic boundaries, in that the MBEs eligible to participate in the plan could be located anywhere in the United States. The MBE plan was touted as a solution for the stated purpose of promoting greater participation by minority business in construction contracting. The operation of the MBE plan included a waiver for contractors who demonstrated to the director of the Department of General Services that the plan's set-aside requirements could not be achieved. There was no administrative appeal of the director's denial of waiver.

The MBE plan was adopted after a public hearing at which no direct evidence was presented that: 1) the City had discriminated based on race in letting contracts, or that 2) prime contractors had discriminated against minority subcontractors. In the creation of its program, the City Council relied upon a statistical study indicating that, in a city where the population was 50 percent Black, less than one percent of the contracts had been awarded to minority businesses in recent years.

In 1983, the same year the MBE plan was adopted, J.A. Croson Company lost a contract to install plumbing fixtures in the city jail because of a failure to satisfy the 30 percent set-aside requirement. Croson determined that to meet the City's requirements, an MBE would have to supply fixtures that would account for 75 percent of its contract price. After contacting

¹⁷ 488 U.S. 469, 109 S.Ct. 706 (1989).

several MBEs on two separate occasions, only one MBE expressed interest, but was unable to submit a bid to Croson due to credit issues. Upon bid opening by the City of Richmond, Croson was the only bidder. Post bid-opening, Croson provided additional time for the MBE to submit a bid to no avail. Croson then requested a waiver from the City, which was denied.

Croson sued the City of Richmond in the U.S. District Court, alleging the plan was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment.¹⁸ The court upheld the plan. In 1985, the Fourth Circuit Court of Appeals affirmed the decision. The U.S. Supreme Court, in an opinion in which Justice O'Connor was joined by four other Justices, held that the Fourteenth Amendment's Equal Protection Clause of the U.S. Constitution was violated by the City of Richmond's set-aside ordinance because:

- 1) Richmond had failed to demonstrate a compelling governmental interest in apportioning public contracting opportunities based on race; and,
- 2) The plan was not narrowly tailored to remedy the effects of prior or present discrimination.¹⁹

The Court stated there was no proof in the record upon which to base a *prima facie* case of a constitutional or statutory violation by any contractors in the Richmond construction industry. The Court further held that the inclusion of Spanish-speaking, Asians, American Indians, Alaskans, and Aleuts, where there was absolutely no evidence of past discrimination against such persons, demonstrated that the City's purposes were not, in fact, to remedy past discrimination. Finally, the Court held that the 30 percent set-aside was not narrowly tailored to remedy the past effects of any prior alleged discrimination.

Standard of Scrutiny Analysis

The *Croson* case falls under the protection of the Equal Protection Clause. The Fourteenth Amendment, which prohibits states from denying any person within its jurisdiction the equal protection of the laws, is usually invoked when the state makes distinctions or classifications. There are three levels of scrutiny under which a state statute, regulation, policy or practice can be examined: strict scrutiny, intermediate scrutiny, or rational basis.

¹⁸ The district court upheld the plan which was affirmed by the Court of Appeals for the Fourth Circuit in reliance on *Fullilove v. Klutznick*, 448 U.S. 448, 100 S. Ct. 2758 (1980). The United States Supreme Court remanded the case for further consideration in light of the decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842 (1986) in which it applied the "strict scrutiny test" in invalidating the local school board's layoff policy.

¹⁹ See *Croson*, at 488 U.S. 469, 109 S. Ct. 706 (1989).

- 1) The **strict scrutiny** standard is evoked if the classification is suspect one based on race, ethnic or alien distinctions or infringements upon fundamental rights. The strict scrutiny test is the most rigorous of the three, requiring the state to show *compelling governmental interests* for making such classifications.
- 2) **Intermediate scrutiny** is applied to gender and age distinctions and requires the state to prove there is *a fair and substantial relationship* between the classification and the objective of the legislation.²⁰
- 3) The **rational basis** standard tests economic programs that do not make distinctions based on race, ethnic origin or gender. Under this standard, the moving party is required to show that the classification is not *rationally related* to a valid state purpose.

A. Croson and Strict Scrutiny

In reviewing the Richmond ordinance, the Supreme Court analyzed an affirmative action program that made distinctions by race. Although the Court was deeply divided, the majority opinion in *Croson* interpreted the Equal Protection Clause as providing the same protection against discrimination and unequal treatment provided to Blacks and other minorities as to non-minority individuals.²¹ The Court reasoned that protection of the individual rights guaranteed by the Equal Protection Clause requires strict judicial scrutiny of the facts and circumstances surrounding the adoption of race-based preferences to “smoke out” possible illegitimate motivations such as simple race politics or racial stereotyping.²²

Justice O’Connor, writing the majority opinion, favored this heightened scrutiny of race-conscious programs, basing her opinion on Justice Powell’s opinions in *University of California Regents v. Bakke*²³ and *Wygant v. Jackson Board of Education*, in which he applied the strict scrutiny standard to race-based preferences related to student admissions and employment, respectively. The use of a heightened scrutiny was necessary, O’Connor reasoned, because the majority Black population in the City of Richmond raised the concern of the Court that a political majority will more easily act to the disadvantage of a minority based on “unwarranted assumptions or incomplete facts . . .”²⁴ Although Justice O’Connor relied on *Wygant* to define the strict scrutiny standard for *Croson*, it is important to note that her concurring opinion in *Wygant* acknowledges the lack of consensus among the members

²⁰ Lower courts have not agreed upon the standard to be applied to physical and mental handicaps, however, intermediate and rational basis have been employed.

²¹ *Croson*, at 721.

²² *Id.*

²³ 438 U.S.265, 98 S. Ct. 2733 (1978).

²⁴ *Croson*, at 722.

of the Court regarding the appropriate interpretation of the strict scrutiny standard. Four members of the Court dissented on the standard set forth in the O'Connor opinion.

While the majority in *Croson* subjected race-based preferences adopted by state and local governments to the most stringent test of constitutionality, the Court apparently did not intend to sound a complete retreat from attempts by state and local governments to remedy racial injustice. In her opinion, Justice O'Connor stated:

“It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction. This authority must, of course, be exercised within the constraints of the Fourteenth Amendment.”²⁵

Justice Kennedy, in his concurring opinion, went further, stating the City, upon intentionally causing wrongs, has an “absolute duty” to eradicate discrimination.²⁶ Even so, the Court concluded that, in the enactment and design of the plan, the City of Richmond failed both prongs of the strict scrutiny test.

1. Compelling Governmental Interest

In some instances, public entities have compelling reasons to remedy past discriminatory treatment of racial or ethnic groups. In *Croson*, the Court noted that a municipality has a compelling interest in redressing discrimination committed by the municipality or private parties within the municipality's legislative jurisdiction if the municipality in some way perpetuated the discrimination to be remedied by the program.²⁷ The Court makes clear that a state or local government may use its legislative authority in procurement to remedy private discrimination, if that discrimination is identified with the “particularity required by the Fourteenth Amendment.”

In *Grutter v. Bollinger*,²⁸ the U.S. Supreme Court further expounded on the compelling governmental test, stating that, “[we] have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination...Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a

²⁵ *Id.* at 720.

²⁶ *Id.* at 734.

²⁷ *Id.* at 720.

²⁸ 539 U.S. 306, 123 S. Ct. 2325 (2003)

framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context.”²⁹

2. Factual Predicate

Race-conscious measures can be adopted when a governmental entity establishes, through a factual predicate, identified instances of past discrimination which must be particularized to provide guidance for the “legislative body to determine the precise scope of the injury it seeks to remedy.”³⁰

The City of Richmond justified its enactment of the plan on these five factors: (1) the plan declared its purpose to be “remedial”; (2) at public hearings in connection with enacting the plan, proponents stated there had been past discrimination in the construction industry locally, throughout the state and the country; (3) minority businesses received .67 percent of prime contracts from the City, while minorities constituted 50 percent of Richmond’s population; (4) minority contractors were grossly under-represented in local contractors’ associations; and (5) U.S. Congressional studies have concluded that minority participation in the construction industry nationally was stifled by the present effects of past discrimination.³¹

The *Croson* court rejected the foregoing factors as inadequate, either singularly or in concert, to establish enough evidence to justify Richmond’s plan for the following reasons:

Remedial Purpose Recitation: The mere recitation of a “remedial” purpose for a racial classification is insufficient, particularly where an examination of the history of the legislation and its legislative scheme suggests that its goal was other than its asserted purpose.³²

Statements Regarding Past Discrimination: The generalized assertions of plan proponents’ that there had been past discrimination in the construction industry were highly conclusive

²⁹ *Sherbrooke* and *Hershell Gill* have concluded that the holdings of the *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411 (2003) and *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325 (2003) cases in no way disturbs the holdings of *Croson*. See *Sherbrooke Turf. Inv. V. Minnesota Department of Transportation*, 345 F. 3d 964 (8th Cir. 2003) and *Hershell Gill Consulting Engineers v. Miami-Dade County*, 333 F.Supp.2d 1305 (2004)

³⁰ *Croson* at 723.

³¹ The City of Richmond attempted in part to predicate its program on the studies cited by the Supreme Court in *Fullilove v. Klutznick*, supra n. 1. The court noted that the Equal Protection component of the Fifth Amendment was not violated when Congress established a set-aside program since it was substantially related to the achievement of an important national goal of remedying the past acts of racial discrimination in the area of public contracts. The Congressional authority to establish a set-aside program is greater than that of a state and is subjected to less judicial scrutiny by the courts. However, the Court in *Adarand Contractors, Inc. v. Federica Pena* held that “all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed under strict scrutiny. 515 U.S. 200, 115 S. Ct. 2097, 2113 (1995)

³² *Id.* at 720.

in nature and of no sufficient evidence or probative value in establishing past discrimination by anyone in the construction industry in the City of Richmond.³³

Disparity in Contracts Awarded: Where special qualifications were required, the comparisons to the general population, rather than to the special smaller group of qualified individuals, may have little probative value. Thus, the relevant statistical pool for demonstrating discriminatory exclusion was the number of MBEs qualified to undertake the task, as opposed to the percentage of minority individuals in the general population. While the plan contemplated minority subcontractor participation, the City did not know how many MBEs in the local area were qualified to do the work or the percentage of MBE participation in city projects.³⁴

Low Participation in Contractors' Association: A low percentage of minorities in the local contractors' associations did not provide sufficient evidence without proof that this low percentage was due to discrimination against, as opposed to the free choice, of Blacks to pursue alternate employment or interests.³⁵

Congressional Findings: The finding by Congress that past discrimination accounted for the low number of minority contractors in the county had little or no probative value with respect to establishing discrimination in the City of Richmond. A more particularized showing of past discrimination by the City was required, such as a pattern of discrimination in the local industry that the City could act to eradicate, or discrimination in which the City was a "passive participant."³⁶

The Court concluded that a more specific inquiry and discovery would be required to support a constitutionally permissible set-aside program. The factual inquiry must be local in nature and the statistical analysis must address a relevant comparison. In *Croson*, Justice O'Connor relied heavily on her opinion and that of Justice Powell in *Wygant*, when specifying the requirement that "judicial, legislative or administrative findings of constitutional or statutory violation" must be found before a government entity has a compelling interest in favoring one race over another.³⁷

For example, in *Wygant*, the U.S. Supreme Court considered the validity of a collective bargaining agreement, which provided special protection for minority teachers in layoffs. The school board argued that the board's interest in providing minority teacher role models for its minority students, as an attempt to alleviate societal discrimination, was sufficiently

³³ *Id.* at 724.

³⁴ *Id.* at 726.

³⁵ *Id.* at 727.

³⁶ *Id.*

³⁷ *Id.* at 723.

important to justify the use of a racial classification embodied in the layoff provision.³⁸ The Justices rejected the role model theory and held that it could not be used to support a remedial measure, such as a layoff provision. The disparity between teachers and students, per the Court, had no probative value in demonstrating discrimination in hiring and promotion, which necessitated corrective action. Substantially, the same conclusion had been reached by the Supreme Court in 1979 in *Bakke*.³⁹

In showing particularized instances of discrimination, the *Croson* Court decided that the factual predicate suffered the same flaws, as did *Wygant's*. The factual predicate depended upon generalized assertions, which could lead to an attempt to match contract awards to MBEs to the minority population. In analyzing the *Croson* factual predicate, the Supreme Court did not “provide a set of standards or guidelines describing the kind of MBE plan that would pass constitutional muster. It simply provided a stringent burden of proof for proponents of MBE laws to meet . . .”⁴⁰ The Court also did not give legislatures much guidance on the parameters of a factual predicate that would show evidence of discrimination. There are some indications of the measures the Court will accept:

- 1) A pattern of discrimination shown through an appropriate disparity analysis can raise an inference of discrimination;
- 2) A relevant market in which the public entity conducts business must be established; and
- 3) Qualitative evidence of discrimination, such as anecdotal testimony, may also be acceptable.

The Court, however, leaves a great deal of room for interpretation in the development of models to satisfy these standards.

Because the *Croson* Court left the task of further establishing a factual predicate to the lower courts, the lower courts have been experiencing difficulties in navigating the complexities in this area of constitutional law. In response, state and local governmental entities use independent consultants to assess if they have the factual predicate or a statistically significant disparity necessary to justify remedial race and/or gender-conscious programs under *Croson*.

³⁸ See *Wygant*, at 274.

³⁹ *Cone v. Hillsborough*, 905 F. 2d 908, 913 (1990)

⁴⁰ 488 U.S. at 507-508.

3. Narrowly Tailored

The Court in *Croson* made it clear that the second prong of the “strict scrutiny” test demands that remedial action be “narrowly tailored” to identify past or present discrimination. At least three characteristics were identified by the Court as indicative of a narrowly tailored remedy:

The program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation; a governmental entity does not have to enact race-neutral means if they are not feasible or conducive to remedying past discrimination;

- The plan should avoid the use of rigid numerical quotas;⁴¹ and,
- The program must be limited in its effective scope to the boundaries of the governmental entity.

Croson found the 30 percent quota in Richmond to be a rigid numerical quota without justification. Because the city considered bids and waivers individually, the Court found no need for the rigid quotas. In creating a plan, a public entity cannot employ quotas simply to avoid “the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination.”⁴²

Upon the discovery of a significant statistical disparity, the public entity can institute measures to “end the discriminatory exclusion.”⁴³ In fact, in some showings of discrimination, goals, quotas or set-asides could be employed: “in the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”⁴⁴ Any plan of action containing racial preferences should be grounded in the statistical assessment of disparity.

Several lower courts have sought to expound upon the components of narrow tailoring dictated by the Supreme Court. In doing so, the following findings have been made:

Flexible and aspirational goals should be demonstrated by being tied to availability, set project-by-project and achieved through good faith efforts.⁴⁵ Goals can be set for small minority groups where discrimination may have negatively impacted their numbers causing the inability to reach statistical significance.⁴⁶ Race-conscious goals within federal contracts

⁴¹ *Id.*

⁴² *Croson* at 729.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Cone v. Hillsborough County*, 905 F. 2d 908 (1990), *Associated General Contractors of Ohio v. Drabik*, 214 F. 3d 300 (6th Cir. 2000).

⁴⁶ *Concrete Works v. County of Denver (Concrete Works D)*, 823 F. Supp. 821, 843 (1993).

should be utilized to achieve the portion of DBE participation that cannot be achieved through race and gender-neutral means.⁴⁷

Waivers and good faith efforts should be an integral component of the program. If MBEs are not available, or submit unreasonably high price quotes, the prime contractor should be granted a waiver.⁴⁸

A sunset clause is also a component of a narrowly tailored MBE program. This can involve: a) a graduation program,⁴⁹ b) a definite date to end the program;⁵⁰ or c) an annual review of MWBE program efficacy, goals, and utilization. MWBE programs should not be designed as permanent fixtures in a purchasing system without regard to eradicating bias in standard purchasing operations or in private sector contracting.

- Additionally, any race-conscious program or other remedial action should not extend its benefits to MBEs outside the political jurisdiction, unless the MBEs can show that they have suffered discrimination within the locale.⁵¹ MWBE programs should be limited in scope to group(s) and firms that suffer the ongoing effects of past or present discrimination.
- Race and gender-conscious MWBE programs should be instituted only after, or in conjunction with, race and gender-neutral programs.
- MWBE programs should limit their impact on the rights and operations of third parties.

In *Grutter v. Bollinger*⁵² and *Gratz v. Bollinger*⁵³, which addressed the standards for utilizing race-conscious measures in public education, the U.S. Supreme Court reviewed the utilization of goals in affirmative action cases. The utilization of race should allow for individualized consideration, and be applied in a flexible, non-mechanical way. The Court

⁴⁷ *Western States Paving Co. v. Washington DOT*, 407 F.3d 983 (9th Cir. 2005).

⁴⁸ *Coral Construction Co. v. King County*, 941 F. 2d at 924, *Associated General Contractors of Ohio v. Drabik*, 214 F. 3d 300 (6th Cir. 2000), *Hershell Gill Consulting Engineers v. Miami-Dade County*, 333 F.Supp.2d 1305 (2004), *Western States Paving Co. v. Washington DOT*, 407 F.3d 983 (9th Cir. 2005)

⁴⁹ *AGC v. Coalition for Economic Equality*, 950 F.2d 1407,1417 (1991), *Associated General Contractors of Ohio v. Drabik*, 214 F. 3d 300 (6th Cir. 2000), *Hershell Gill Consulting Engineers v. Miami-Dade County*, 333 F.Supp.2d 1305 (2004) (August 24, 2004).

⁵⁰ *AGC v. San Francisco*, 748 F. Supp. 1443, 1454 (1990), *Associated General Contractors of Ohio v. Drabik*, 214 F. 3d 300 (6th Cir. 2000).

⁵¹ *Concrete Works I*, 823 F. Supp. 821, 843 (1993). This was true even if the statistical evidence shows discrimination by contractors in cities in other locales, *Coral Construction v. King County*, 941 F. 2d 910, 925 (1991).

⁵² 539 U.S. 306, 123 S. Ct. 2325 (2003)

⁵³ 539 U.S. 244, 123 S. Ct. 2411 (2003)

appears to conclude that race can be used as more of a “plus” factor, as opposed to a defining feature of the application.

In *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation* and *Gross Seed Company v. Department of Transportation*⁵⁴, the Eighth Circuit Court of Appeals has interpreted these two cases considering the U.S. Supreme Court’s decision in *Croson*. The court found that the DOTs’ goal programs were consistent with the requirements of *Gratz* and *Grutter*, as they were flexible and individualized and emphasized race-neutral means.

In *Western States Paving Co., Inc. v. Washington State Department of Transportation*⁵⁵, the Ninth Circuit Court of Appeals reached a similar conclusion in finding that Washington DOT met the compelling governmental interest test, but failed the narrow tailoring test. The court found that Washington DOT did not present any evidence of discrimination within the transportation construction market. Missing the court stated was (1) a statistical analysis that considered capacity of firms within Washington DOTs market, and (2) anecdotal testimony.⁵⁶ A more detailed discussion of *Western States Paving* is contained under Judicial Review of DBE and MWBE Programs in the Ninth Circuit and the State of California.

4. Overconcentration

The District Court of Minnesota recently considered whether a DBE Program was not narrowly tailored due to overconcentration in *Geyer Signal, Inc. v. Minnesota DOT*⁵⁷. In this case, Geyer sought a permanent injunction of Minnesota DOT’s DBE Program, declaring it unconstitutional on its faces and as applied. A major argument made by Geyer was that the DBE program was not narrowly tailored because DBE goals were only satisfied through a few areas of work on construction projects or over-concentrated, which burdens non-DBEs in those sectors and not addressing problems in other areas.⁵⁸ Under the federal requirements, DBE programs are required to monitor and address issues of overconcentration. The court first held that plaintiffs failed to establish that the DBE Program will always be fulfilled in a manner that creates overconcentration, as is required under a facial challenge. Goals are established based on DBEs that are ready, willing and able to participate, thus accounting for work that DBEs are unable to perform. As such, the non-existent DBEs would not be factored into availability.⁵⁹ Second, the court found, where there are issues of overconcentration, MnDOT Program has established mechanisms to address through:

⁵⁴ 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Circuit, May 2004)

⁵⁵ 407 F.3d 983 (9th Cir. 2005)

⁵⁶ *Id.* at 1002-1003.

⁵⁷ 2014 WL 1309092

⁵⁸ *Id.* at 11.

⁵⁹ *Id.* at 16.

- Flexible contract goals that allow MnDOT to change focus from over-concentrated areas;
- Ability of prime contractors to subdivide projects that would typically require more capital and equipment than a DBE can acquire;
- Waivers; and,
- Incentives, technical assistance, business development programs, mentor-protégé programs and other measures to assist DBEs to work in other areas, where there is not overconcentration.⁶⁰

The as-applied challenge failed as well. On the issue of overconcentration, the district court held that there is “no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business’ self-assessment of what industry group they fall into and what other businesses are similar.”⁶¹ Because Geyer did not demonstrate that the NAICs code analysis was unreasonable or that overconcentration exists in its type of work, it did not show that MnDOT’s program was not narrowly tailored.

5. Race-Neutral Alternatives

The Court in *Croson* held that the MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation. The *Croson* Court stated that, in Richmond, there did “not appear to have been any consideration of the use of race-neutral means to increase minority participation in City contracting.”⁶² The Court further stated that, in upholding the federal set-aside in *Fullilove*⁶³, “Congress had carefully examined the rejected race-neutral alternatives before enacting the MBE set-aside.” This was because “by the time Congress enacted [the MBE set-aside] in 1977, it knew that other racial remedies had failed to ameliorate the effects of racial discrimination in the construction industry.”⁶⁴

While *Croson* does not define race-neutral programs or what constitutes a consideration of race-neutral programs, other passages in *Croson* do shed some light on the Court’s opinion on these two issues. The Supreme Court noted that the City of Richmond had at its disposal

⁶⁰ *Id.* at 16-17.

⁶¹ *Id.* at 20.

⁶² *Croson*, citing *U.S. v. Paradise*, 480 U.S. 49, 171 (1987).

⁶³ In *Fullilove v. Klutnick*, 448 U.S. 448 (1980), the U.S. Supreme Court found that the United States government could use its spending power to remedy past discrimination in the construction industry by establishing that 10 percent of federal funds could go to minority-owned firms under a set-aside program. *Fullilove v. Klutnick* was overruled by *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), bringing federal programs in line with *Richmond v. Croson*.

⁶⁴ *Croson*, at 732 (1989).

a wide array of race-neutral measures that could “increase the accessibility of City contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect.”⁶⁵

The Court also suggested that the City may “[a]ct to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.”⁶⁶ Thus, the cities can attempt to thwart discrimination in those private industries that can award city contracts to minority contractors.⁶⁷

What constitutes an adequate consideration of race-neutral programs is vaguer. *Fullilove* held that Congress made a thorough investigation of the inadequacy of race-neutral measures to promote MBEs. While *Croson* held that Richmond could not rely on the congressional findings referred to in *Fullilove*, presumably, Richmond could have relied on a similar quantum of evidence that Congress relied upon in *Fullilove*. However, congressional findings in *Fullilove* were remarkably thin with no hearings held to document the discrimination that the statute in *Fullilove* set out to rectify. While *Fullilove* has been in large part superseded by *Adarand v. Peña*, *Adarand* was also largely silent on what constituted an adequate consideration of race-neutral alternatives.⁶⁸

Subsequent federal case law has provided some illumination on the question of what constitutes adequate consideration of race-neutral measures.

As stated previously, a governmental entity does not have to enact race-neutral means if they are not feasible or conducive to remedying past discrimination.⁶⁹

If race-neutral programs and legislation were in place prior to the establishment of a race-conscious program and had been attempted in good faith, and yet MWBE participation in public procurement remains low relative to availability, then an inference is created that race-neutral programs were inadequate to relieve the impact of past discrimination.⁷⁰

⁶⁵ *Id.* at 706-707.

⁶⁶ *Id.* at 729.

⁶⁷ However, the court did not say whether this influence should be exercised through legislative enactment.

⁶⁸ See fn 45, as well as discussion below in **6. Scrutiny applied to Federally Funded Programs.**

⁶⁹ *Coral Construction v. King County*, 941 F.2d 910, 923 (9th Cir. 1991), *AGC of California v. Coalition of Economic Equity*, 950 F. 2d 1401,1417 (9th Cir. 1991), *Engineering Contractors v. Dade County*, 122 F. 3d 895 (11th Cir. 1997), *Concrete Works of Colorado, Inc. v. City and County of Denver (Concrete Works I)*, 823 F. Supp. 821 (D Colo 1993), *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005).

⁷⁰ *Concrete Works I* at 841.

6. Scrutiny Applied to Federally Funded Programs

a. Background of *Adarand v. Peña*

In *Adarand Contractors, Inc. v. Peña*⁷¹ the U.S. Supreme Court analyzed the constitutionality of a federally funded race-conscious DBE program. The facts of *Adarand III*⁷² are as follows. The Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation, in 1989, awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. Petitioner Adarand, a Colorado-based highway construction company that specialized in guardrail work, submitted the lowest bid. Gonzales Construction Company also submitted a bid to complete the guardrails.⁷³ Gonzales was a certified Disadvantaged Business Enterprise (DBE), however Adarand was not. Mountain Gravel awarded the subcontract to Gonzales, even though Adarand had the lowest bid.⁷⁴

Federal law requires a subcontracting clause “be inserted which states that [the] contractor shall presume that socially and economically disadvantaged individuals include Blacks, Hispanics, American Indians, Asians, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.”⁷⁵ Adarand filed suit in the United States District Court for the District of Colorado against various federal officials, claiming that the race-based presumptions involved in the use of subcontracting compensation clauses violated Adarand’s right to equal protection. In addition to its general prayer for “such other and further relief as to the court seems just and equitable,” Adarand specifically sought declaratory and injunctive relief against any *future* use of subcontractor compensation clauses.⁷⁶ The District Court ruled against Adarand, (*Adarand I*) granting the government’s motion for summary judgment. The Court of Appeals affirmed. (*Adarand II*)⁷⁷

⁷¹ 515 U.S. 200; 115 S. Ct. 2097 (2005).

⁷² *Id.*

⁷³ *Id.* at 205.

⁷⁴ *Id.* Note that in *Western States Paving*, the Ninth Circuit concluded that a DBE program is not rendered unconstitutional because it sometimes results in bids by non-DBE firms being rejected in favor of higher bids from DBEs. “Although this places a very real burden on non-DBE firms, this fact alone does not invalidate TEA 21. If it did, all affirmative action programs would be unconstitutional because of the burden on non-minorities.” 407 F.3d at 995.

⁷⁵ *Id.* at 205.

⁷⁶ *Id.* at 210.

⁷⁷ *Id.*

b. Discussion of U.S. Supreme Court Ruling

Before the U.S. Supreme Court could decide on the merits of the case, it had to determine whether Adarand had standing to seek forward-looking relief. For Adarand to have standing, it would have to allege that the use of subcontractor compensation clauses in the future constitutes “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.”⁷⁸ The Court determined that Adarand’s claim met this test. The Court further stated that Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a “discriminating classification prevent[s] the plaintiff from competing on an equal footing” ... The aggrieved party “need not allege that he would have obtained the benefit but for the barrier in order to establish standing.”⁷⁹

The next issue the Court addressed was the standard of review for federal racial classifications in determining the viability of programs to address discrimination. The Court concluded “that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny,”⁸⁰ thereby holding “that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” Such classifications are constitutional only if they have narrowly tailored measures that further compel governmental interests. The Court, in its decision, recognized the persistence of the practice and lingering effects of racial discrimination against minority groups and the government’s ability to act in response to it. Further, the Court wanted to dispel the notion that strict scrutiny is “strict in theory, but fatal in fact.”⁸¹

c. Adarand on Remand to the Lower Courts

The Court remanded the case to the United States Tenth Circuit Court of Appeals to address several issues:

- d. To determine whether the interests served using subcontractor compensation clauses are properly described as “compelling;”
- e. To address narrow tailoring in terms of strict scrutiny cases by exploring the use of race-neutral means to increase minority business participation in government contracting;

⁷⁸ *Id.* at 211.

⁷⁹ *Id.* at 211.

⁸⁰ *Adarand*, 515 U.S. at 224.

⁸¹ *Fullilove*, supra at 519.

- f. To determine whether the program is appropriately limited, so it will not outlive the discriminatory effects it was designed to eliminate;
- g. To review the discrepancy between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs; and,
- h. To determine whether 8(d) subcontractors must make individualized showings, or whether the race-based presumption applies to both socially and economically disadvantaged businesses.

The Tenth Circuit Court of Appeals remanded the case to the district court for action on the issues raised by the U.S. Supreme Court.⁸² The federal district court in *Adarand* (“*Adarand IV*”) accepted the federal government’s evidence of compelling interest, but rejected the DBE program in Colorado as not being narrowly tailored.⁸³ The court, although acknowledging the U.S. Supreme Court’s pronouncement that strict scrutiny is not “fatal in fact”, found it “difficult to envisage a race-based classification” that would ever be narrowly tailored, thereby effectively pronouncing strict scrutiny fatal in fact.⁸⁴

Following *Adarand IV*, the Tenth Circuit Court of Appeals, in *Adarand V*, considered subsequent events that the court deemed to have rendered the case moot.⁸⁵ During the litigation, Adarand applied for and was granted DBE certification by the Colorado Department of Transportation. The appellate court concluded that Adarand could no longer demonstrate an injury stemming from the Subcontractors Compensation Clause (a federal subcontracting program), and therefore, the case was moot.⁸⁶

In the U.S. Supreme Court’s review of the court of appeals decision in *Adarand VI*, the Court reversed the lower court, holding that “it was ‘far from clear’ that DOT would not initiate proceedings to revoke Adarand’s status and because ‘it is impossible to conclude that respondents have borne their burden of establishing that it is ‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur’ petitioner’s cause of

⁸² *Adarand Constructors, Inc. v. Pena*, 965 F.Supp. 1556 (D.Colo. 1997).

⁸³ Similarly, a Texas District court, in *Rothe Development Corp v. U.S. Department of Defense*, Civ. Act No. SA-98-CV-1011-EP (1999), upheld the federal government benchmark study as an adequate factual predicate for the small, disadvantaged business program of the U.S. Department of Defense. See also *Concrete Works of Colorado, Inc. v. City and County of Denver, Co.* Civil Action No: 92-M-21 Mar. 7, 2000.

⁸⁴ See *Adarand Constructors, Inc. v. Pena* 965 F. Supp. 1556, 1580 (D. Colo. 1997) (“*Adarand IV*”)

⁸⁵ See *Adarand Constructors, Inc. v. Slater*, 169 F.3d 1292 (10th Cir. 1999) (“*Adarand V*”)

⁸⁶ *Id.* at 1296-1297

action remains alive.”⁸⁷ The Supreme Court remanded the case back to the Appellate Court for consideration on the merits.

On remand, in *Adarand VI*, the Appeals Court found that the government’s evidence more than satisfied the compelling interest prong of the strict scrutiny test, thus reversing the district court’s holding in *Adarand IV*. The Court then considered whether the programs currently before the Court were narrowly tailored using the following factors: (1) the availability of race-neutral alternative remedies, (2) limits on the duration of the subcontractors’ compensation clause program and the DBE certification program, (3) flexibility, (4) numerical proportionality, (5) the burden on third parties, and (6) over- or under-inclusiveness. Taking all these factors into consideration, the Court found the amended and revised subcontracting program and DBE certification programs to be narrowly tailored.⁸⁸ On November 27, 2001, in *Adarand Constructors v. Mineta*, (*Adarand VII*) the U.S. Supreme Court dismissed the writ of certiorari on the Tenth Circuit’s decision as improvidently granted.⁸⁹

B. Intermediate Scrutiny

The courts examine programs that give preference to women-owned businesses under a different standard than racially-based programs. A gender-conscious program created by a governmental entity is examined under the intermediate scrutiny test, rather than the strict scrutiny test employed for racial classifications.⁹⁰ Under intermediate scrutiny review, the actions of the state are valid if they are “substantially related” to important governmental objectives, supported by sufficiently probative evidence or exceeding persuasive justification.⁹¹

In *Coral Construction Co. v. King County*⁹², the Ninth Circuit employed the intermediate scrutiny test to review King County’s WBE program by examining the validity of a sex-based preference.⁹³ Under the test, the Court noted that the gender classification must serve an

⁸⁷ *Adarand Constructors, Inc. v. Slater*, 120 S.Ct. 722, 726-27 (2000) (“Adarand VI”)

⁸⁸ *Adarand Constructors, Inc. v. Slater*, docket no. 90-K-1413 (D. Colo) (Sep 25, 2000)

⁸⁹ 534 U.S. 103, 122 S. Ct. 511 (2001). See also *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 123 S. Ct. 2325 (2003)

⁹⁰ See e.g. *City of Cleburne*, supra no.6.

⁹¹ *Id.* at 441. See also *Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

⁹² 941 F.2d 910 (9th Cir. 1991)

⁹³ See *Coral Construction Co. v. King County*, 941 F.2d 910,931 (9th Cir. 1991); *Contractors Ass’n. Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 (3rd Cir. 1993). The Sixth Circuit Court of Appeals employed the intermediate scrutiny review in *Michigan Road Builders Ass’n. v. Milliken*, 834 F. 2d 583 (6th Cir. 1987), *aff’d* 49 U.S. 1061 (1989). However, after *Croson*, the Sixth Circuit seemingly applied a strict scrutiny test when considering a gender-based affirmative action program.

important governmental objective, and there must be a “direct, substantial relationship” between the objective and the means chosen to accomplish that objective.⁹⁴ A governmental entity may use gender-based preferences “only if members of the gender benefited by the classification actually suffered a disadvantage related to the classification.”⁹⁵

Per the court of appeals, unlike the strict standard of review applied to race-based programs, intermediate scrutiny does not require any showing of governmental involvement, active or passive, in the discrimination it seeks to remedy.⁹⁶ The Court would uphold the ten percent gender preference if the County could establish a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination.

The Court concluded that King County had legitimate and important interests in remedying the many disadvantages that confronted women business owners. Further, the means chosen was substantially related to the objective. The Court determined there was adequate information to show discrimination against women in King County⁹⁷ after reviewing an affidavit from a woman business owner detailing that less than seven percent of her firm’s business came from private contracts with the majority coming from gender-based set-aside programs.

The Ninth Circuit revisited this issue in *Western States* where it essentially applied the intermediate scrutiny standard to gender discrimination. The Court determined that conducting a separate analysis for sex discrimination under intermediate scrutiny was not necessary, “in this case, intermediate scrutiny would not yield a different result than that obtained under strict scrutiny’s more stringent standard.”⁹⁸

The Court of Appeals for the Third Circuit in the City of Philadelphia noted that the Supreme Court’s gender discrimination cases are inconclusive and the Court has never squarely ruled on the necessity of statistical evidence in gender discrimination cases. However, the court of appeals found that the City must be able to rely on less evidence in enacting a gender preference than a racial preference, because the intermediate scrutiny standard is less stringent than the strict scrutiny test applied in *Croson*.⁹⁹

⁹⁴ *Id.* at 921.

⁹⁵ *Id.* at 931.

⁹⁶ *Id.* at 932.

⁹⁷ *Id.* at 932-33. In *Construction Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, supra n. 76, the Court of Appeals for the Third Circuit also applied the intermediate standard to a gender-based preference program.

⁹⁸ *Western States* at 407 F.3rd 990, fn 6.

⁹⁹ *Id.* at 1010. Another example of this double standard was in *RGW Construction v. San Francisco BART*, Case No. C92-2938 TEH (N.D. CA). In this case, an injunction was issued against the race-conscious but not the gender-conscious program area of BART’s DBE program for non-federally funded contracts because of the lack of a factual predicate for the program. The injunction was later partially lifted based on evidence in two disparity studies in counties where BART operated.

In support of its program, Philadelphia relied only on general statistics and one affidavit from a woman in the catering business. Since there was not a disparity index for women-owned construction businesses, and given the absence of anecdotal evidence establishing discrimination in the construction industry, the court of appeals affirmed the grant of summary judgment, invalidating the gender preference for construction contracts.

In *Engineering Contractors Association of South Florida Inc. v. Metropolitan Dade County*, the Eleventh Circuit Court of Appeals held that the intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases.¹⁰⁰ The level of evidence that is sufficient to meet the intermediate scrutiny test is “one of degree, not of kind.”¹⁰¹ This test requires less evidence than a race-conscious constitutional review. The Court, however, noted that the difficulty in determining the adequacy of evidence in gender-conscious cases is determining how much evidence is permissible. To resolve this issue, the Court looked to the Third Circuit Court of Appeals’ review of the City of Philadelphia for guidance and applied the same analysis to its review of the Dade County WBE program.

C. Rationally Related Standard of Scrutiny

Race-neutral economic development and local business programs would be evaluated under the rationally related test. That is, a legitimate state interest must exist and the means employed to further the interest must be rationally related to the legislation’s purpose.

In the 1987 case of *Associated General Contractors of California v. City and County of San Francisco*,¹⁰² the Court held that the City had a legitimate state interest in encouraging businesses to locate and remain in the city. Two factors were used to substantiate the City’s interest. First, the Court noted the higher administrative costs of doing business within the City, such as higher rents, taxes and wages, incurred by disadvantaged businesses. Second, the Court noted that the public interest was best served by encouraging businesses to be in the city. The Court also noted that foreign businesses could be locally-owned business enterprises (LBEs) by acquiring offices within the City and paying permit and license fees from a city address.

In *Gary Concrete Products, Inc. v. Riley*¹⁰³ the Court held that an LBE bid preference was constitutional, as the State has a legitimate interest in directing the benefits of its purchases to its citizens. The Court concluded that bid preferences for residents encourage local

¹⁰⁰ 122 F.2d 895 (11th Cir. 1997).

¹⁰¹ *Id.*

¹⁰² 813 F. 2d 922, 943 (9th Cir 1987)

¹⁰³ 285 S.C. 498, 331 S.E. 2d 335 (1985)

industry, which increases the tax base and helps the state economy. The statute was rationally related, even though non-residents could qualify for the preference. Non-residents qualified only when they maintained an office and inventory in the state and paid certain taxes.

D. Burden of Proof

Under the *Croson* strict scrutiny analysis, the governmental entity has the initial burden of showing that there was a “strong basis in evidence” supporting its race and gender-conscious program. This evidentiary burden is met by satisfying *Croson*’s two-pronged test of showing both a compelling governmental interest and narrow tailoring. *Croson* established that a factual predicate consisting of statistically significant disparity and anecdotal interviews was important to showing compelling governmental interest.¹⁰⁴ Several courts have since held that disparity studies are important to establishing the factual predicate that supports *Croson*’s two-pronged test.¹⁰⁵

Once the governmental entity has met the *Croson* two-pronged test, the burden of proof shifts to the plaintiff to rebut the showing. The plaintiff cannot simply state that the evidence submitted by the governmental entity is insufficient or flawed. According to the Eleventh Circuit, the plaintiff has the ultimate burden of persuading the court that the defendant’s evidence “did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently “narrowly tailored.”¹⁰⁶ The court stated that the plaintiff could rebut the inference of discrimination with a neutral explanation by showing that the statistics were flawed, that the disparities are not significant or actionable or by presenting contrasting data. In *Rowe v. Tippett*, the Fourth Circuit held that:

Those challenging race-based remedial measures must "introduce credible, particularized evidence to rebut" the state’s showing of a strong basis in evidence for the necessity for remedial action. *See Concrete Works*, 321 F.3d at 959 (internal quotation marks omitted). Challengers may offer a neutral explanation for the state’s evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *See Eng’g Contractors*, 122 F.3d at 916; *Contractors Ass’n of E. Pa, Inc. v. City of Philadelphia*, 6 F.3d 990, 1007 (3d Cir. 1993) (*Contractors Ass’n ð*); *Coral Constr. Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

¹⁰⁴ See *Croson* discussion supra, at pp.5-9.

¹⁰⁵ See *Caltrans*, 713 F.3d at 1195-1200; *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994).

¹⁰⁶ *Engineering Contractors*. at 916.

However, mere speculation that the state's evidence is insufficient or methodologically flawed does not suffice to rebut a state's showing. *See Concrete Works*, 321 F.3d at 991.¹⁰⁷

2.2.2 JUDICIAL REVIEW OF DBE AND MWBE PROGRAMS IN THE NINTH CIRCUIT AND THE STATE OF CALIFORNIA

BART's DBE, SB, and Non-discrimination (ND) programmatic initiatives must be viewed considering case law in the Ninth Circuit and the State of California. Cases decided since *Croson* have a significant impact on the nature and scope of programs targeting M/W/DBEs in California. The issues impacting BART's programs are outlined below. Following this listing is a discussion of each highlighted issue:

- A. Constitutionality of DBE Programs Under Equal Protection Clause and Proposition 209
- B. Constitutionality of Proposition 209 considering the Equal Protection Clause
- C. Constitutionality of Outreach to MWBEs and MWBE Reporting Requirements Under Proposition 209
- D. Constitutionality of Non-Discrimination Programs considering Proposition 209

A. Constitutionality of DBE Programs under Equal Protection Clause and Proposition 209

1. Western States Paving Co. v. Washington DOT

Western States Paving is the seminal case on federal race and gender-conscious programs in the Ninth Circuit and has been widely viewed and considered by other judicial circuits. In *Western States Paving Co. v. Washington DOT*¹⁰⁸, the Ninth Circuit considered whether the Washington DOT's DBE program met the compelling governmental interest test and the narrow tailoring requirements of strict scrutiny necessary to implement race conscious remedies. In holding that Washington DOT had not met the two-pronged test, the Ninth Circuit ruled that the Washington DOT had to provide evidence that its program was narrowly tailored to discrimination within its local area.

Western States Paving Co., a white male-owned asphalt and paving contractor, bid for subcontracting work on projects with the City of Vancouver and Clark County in July and

¹⁰⁷ *Rowe v. Tippett*, 615 F.3d 233, 241-242, (4th Cir. 2010).

¹⁰⁸ 407 F.3d 983 (9th Cir. 2005)

August 2000. These projects were financed by federal transportation funds provided by Washington DOT, under the Transportation Equity Act for the 21st Century (“TEA-21”). In accordance with TEA-21’s minority utilization requirements, Washington DOT established a 14 percent minority participation goal. The prime contractors bidding on the City and County’s projects rejected Western States’ sub-bid in favor of higher bids from a minority-owned firm. Western States filed suit against Washington DOT, Clark County and the City of Vancouver.¹⁰⁹

The U.S. DOT and FHWA intervened to defend TEA-21’s facial constitutionality. The federal government took no position on Western State’s as-applied challenge. The district court upheld TEA-21’s minority preference both on its face and as-applied. The court held that Washington DOT did not have to independently demonstrate that its minority preference program satisfied strict scrutiny.¹¹⁰

On appeal, the Ninth Circuit held that Washington DOT could rely on Congressional findings of compelling governmental interest. However, Washington DOT had to meet the narrow tailoring test by showing that race-based measures justified under the national program are needed in its local area. “If no such discrimination is present in Washington, then the State’s DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely based on their race or sex.”¹¹¹ While the Court of Appeals upheld the constitutionality of the federal statute and regulations, it struck down Washington DOT’s program for not being narrowly tailored.

a. Facial Challenge

After first establishing that strict scrutiny would be the standard of review and would frequently look to the Tenth¹¹² and Eighth Circuits¹¹³, which had already considered the constitutionality of TEA-21, the Ninth Circuit first considered Western States’ facial challenge. Under a facial challenge, the challenger must show that “no set of circumstances exists under which the Act would be valid.”¹¹⁴ In reviewing the Act, TEA-21, the court recognized that the federal government has a compelling interest to ensure that its funds are not distributed in a manner that perpetuates the effects of public or private discrimination within the transportation contracting industry. In determining whether such a compelling

¹⁰⁹ *Id.* at 988.

¹¹⁰ *Id.* at 989.

¹¹¹ *Id.* at 998.

¹¹² Referencing *Adarand Constructions, Inc. v. Slater* (Adarand VII), 228 F.3d 1147 (10th Cir. 2000), cert. dismissed sub nom., *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 122 S.Ct. 511, 151 L.Ed.2d 489 (2001).

¹¹³ *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 124 S.Ct. 2158, 124 S.Ct. 2158, 158 L.Ed.2d 729 (2004).

¹¹⁴ *Id.* at 991, quoting *United States v. Salerno*, 481 U.S. 739, 745, 107, S. Ct. 2095, 95 L.Ed.2d 697 (1987).

interest existed, the court would review the evidence to ensure that the federal government had a “strong basis in evidence for its conclusion that remedial actions was necessary.”¹¹⁵

The court reviewed both statistical and anecdotal evidence of discrimination. The court found that Congress considered the following statistical evidence:

- Statistical evidence for percentage of racial minorities represented in the U.S. population; the number of firms owned; average gross receipts; percentage of federal contract dollars received; women as a percentage of firms owned; percentage of federal contract dollars received; comparison to white males in terms of loan dollars; drop in participation post-*Croson*;
- U.S. Department of Justice Study, *The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fe. Reg. 26,050 (May 23, 1996).

Further, the court held that Congress need not consider evidence that minorities experience discrimination in every State’s public contracting market, citing *Rothe Dev. Corp. v. United States Dep’t of Defense*¹¹⁶. With its review consistent with both the Eighth and Tenth Circuits, the Ninth Circuit found that Congress had enough evidence to conclude that there was discrimination within the transportation contracting industry that hinders minorities from competing for federally funded contracts.¹¹⁷

The court then sought to determine whether TEA-21 was narrowly tailored. The U.S. Supreme Court identified several factors that are to be used in this determination:

- “The efficacy of alternative remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of the numerical goals to the relevant labor market; and,
- The impact of the relief on the rights of third parties.”¹¹⁸

In reviewing TEA-21 considering the above standard, the Ninth Circuit made the following findings as to each component of the standard:

¹¹⁵ *Id.*, quoted *Croson*, 488 U.S. at 500, 109 S. Ct. 706 (1989).

¹¹⁶ *Id.* at 993, citing 262 F.3d 1306, 1329 (Fed.Cir.2001).

¹¹⁷ *Id.* at 993.

¹¹⁸ *Id.*, quoting *United States v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987).

- **Alternative remedies:** TEA-21 placed an emphasis on the utilization of race-neutral alternatives, including informational and instructional programs targeted to all small businesses, to achieve its DBE goal. The government need not exhaust “every conceivable race-neutral alternative,” but must make serious good faith efforts.¹¹⁹
- **Flexibility and duration of relief:** TEA-21 prohibits the use of quotas. It also allows prime contractors to meet the subcontracting goals, either by subcontracting to DBEs or demonstrating good faith efforts. Further, a State cannot be penalized for not meeting its goal, if it makes a good faith effort.¹²⁰
- **Relationships of numerical goals to relief:** Utilization goals must be close in relationship to the availability of minority firms in a particular market. TEA-21 establishes an aspirational goal of 10 percent and requires States to set their own DBE goals based upon “the proportion of ready, willing, and able DBEs in the State’s transportation contracting industry.”¹²¹
- **Impact on third parties:** The court first noted that if TEA-21 could be invalidated purely because of the burden placed on non-DBEs by being rejected in favor of higher bids from DBEs, all affirmative action programs would be unconstitutional for this reason. Even so, TEA-21 includes provisions to minimize the burden on non-DBEs, including providing the opportunity for a non-minority to qualify as a DBE, if the non-minority can demonstrate social and economic disadvantage and meets the \$750,000 net worth limitation on DBE status.¹²²

The Ninth Circuit found TEA-21 to be narrowly tailored.

b. As-Applied

The Ninth Circuit then considered Western States’ as-applied challenge. First, the court agreed with both the Eighth and Tenth Circuits that Washington DOT did not need to independently demonstrate a compelling government interest for its DBE program.¹²³ It further agreed with the two circuits that it was necessary to make an as-applied inquiry to discover if Washington DOT’s program was narrowly tailored. As such, it held that the district court erred in upholding Washington’s DBE program for simply complying with federal program requirements.¹²⁴

¹¹⁹ *Id.*

¹²⁰ *Id.* at 994.

¹²¹ *Id.*

¹²² *Id.* at 995.

¹²³ See also *Mountain West Holding v. State of Montana*, 2014 WL 6686734 and *Geyer Signal, Inc. v. MnDOT*, 2014 WL 1309092

¹²⁴ *Id.* at 997.

The court reviewed the evidence presented by Washington DOT to support narrow tailoring. It found that Washington DOT had developed its program by following the sample DBE program developed by U.S. DOT. As the Ninth Circuit looked for “the performance capacity of DBEs in a race-neutral market,”¹²⁵ the court found the following deficiencies in Washington DOT’s analysis:

- Washington DOT’s calculation of the capacity of DBEs to do work was flawed because it failed to consider the effects of past race-conscious programs on current DBE participation.
- The disparity between DBE participation on contracts with and without affirmative action components did not provide any evidence of discrimination.¹²⁶
- A small disparity between the proportion of DBE firms in the state and the percentage of funds awarded to DBEs in race-neutral contracts (2.7 percent in the case of Washington DOT) was entitled to little weight as evidence of discrimination, because it did not account for other factors that may affect the relative capacity of DBEs to undertake contracting work.
- This small statistical disparity is not enough, standing alone, to demonstrate the existence of discrimination. To demonstrate discrimination, a larger disparity would be needed.
- Washington DOT did not present any anecdotal evidence of discrimination.
- The affidavits required by 49 CFR 26.67(a), in which DBEs certify that they are socially and economically disadvantaged, are not evidence of the presence of discrimination.

Consequently, the court found that the Washington DOT DBE program was unconstitutional as applied.¹²⁷

¹²⁵ *Id.* at 1000.

¹²⁶ While not specifically stated as evidence of discrimination, in the more recent Caltrans’ case, the Ninth Circuit found this comparison useful and probative—“ A key difference between federally funded and state fund contracts is that race-conscious goals were in place for the federally funded contracts during the 2002-2006 period, but not for the state funded contracts. Thus, state funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data.” *Caltrans*, at 1198.

¹²⁷ <http://www.transportation.gov/osdbu/disadvantaged-business-enterprise/western-states-paving-company-case-q-and-a>; See also *Id.* at 1000-1002.

The U.S. DOT in the *Western States* Q&A further interpreted the impact of the case on factual predicates conducted in the Ninth Circuit:

- The study should ascertain the evidence for discrimination and its effects separately for each of the groups presumed by Part 26 to be disadvantaged. The study should include an assessment of any anecdotal and complaint evidence of discrimination.
- Recipients may consider the kinds of evidence that are used in "Step 2" of the Part 26 goal-setting process, such as evidence of barriers in obtaining bonding and financing, disparities in business formation and earnings.
- With respect to statistical evidence, the study should rigorously determine the effects of factors other than discrimination that may account for statistical disparities between DBE availability and participation. This is likely to require a multivariate/regression analysis.
- The study should quantify the magnitude of any differences between DBE availability and participation, or DBE participation in race-neutral and race-conscious contracts. Recipients should exercise caution in drawing conclusions about the presence of discrimination and its effects based on small differences.
- In calculating availability of DBEs, the study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.
- Recipients should consider, as they plan their studies, evidence-gathering efforts that Federal courts have approved in the past. These include the studies by Minnesota and Nebraska cited in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), cert. denied 124 S. Ct. 2158 (2004) and the Illinois evidence cited in *Northern Contracting, Inc. v. State of Illinois, et al.* 2005 WL 2230195, N.D.Ill., September 08, 2005 (No. 00 C 4515).¹²⁸

2. *Associated General Contractors of America, San Diego Chapter v. California Department of Transportation*

After the district court held that the California Department of Transportation (Caltrans) had met the requirements established in *Western States*, the AGC (Associated General Contractors of America) appealed to the Ninth Circuit in *Associated General Contractors of*

¹²⁸ *Id.*

*America, San Diego Chapter v. California Department of Transportation.*¹²⁹ The district court ruled that “Caltrans’ substantial statistical and anecdotal evidence provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups.”¹³⁰ In considering the appeal, the Ninth Circuit dismissed the appeal due to the AGC’s lack of standing to bring suit, because the AGC was unable to identify any of its members who had suffered or would suffer harm as a result of Caltrans’ program. Even though it dismissed the case, the Ninth Circuit went on to review whether Caltrans had satisfied strict scrutiny and the *Western States*’ two-pronged test.¹³¹

The Court of Appeals defined the two-prong test for narrow tailoring from *Western States*’ as:

1. The state must establish the presence of discrimination within its transportation contracting industry, and
2. The remedial program must be “limited to those minority groups that have actually suffered discrimination.”¹³² *Id.* at 997-98.

a. Disparity Study Evidence

In determining whether its test had been met, the Ninth Circuit first outline the evidence submitted by the consultant in a disparity study commissioned by Caltrans:

- **Availability**—the research firm reviewed extensive data to calculate DBE availability, including a review of “public records, interviews, assessments as to whether a firm could be considered available for Caltrans contracts, as well as numerous other adjustments¹³³;
- **Utilization**—the research firm reviewed over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006. Contracts were assessed separately based on funding source (state or federal), type of contract (prime or subcontract) and type of project (engineering or construction.) Because state-funded projects did not have race-conscious goals, they served as “a control group to help determine whether previous affirmative action programs skewed the data.”¹³⁴
- **Disparity**—the research firm calculated disparities in all twelve of Caltrans’ administrative districts and at the statewide level. Disparities were reported by race

¹²⁹ 713 F.3d 1187 (9th Cir. 2013)

¹³⁰ *Id.* at 1190.

¹³¹ *Id.* at 1200.

¹³² *Id.* at 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

¹³³ *Id.* at 1191-1192.

¹³⁴ *Id.* at 1192.

and gender; women represented white women-owned firms. The firm found substantial disparities for African Americans, Asian-Pacific Americans and Native Americans, however, it did not find substantial disparities for Native and Asian-Pacific Americans in every subcategory. There was disparity for women on state-funded contracts.¹³⁵

- **Anecdotal Evidence**—the research firm’s anecdotal evidence included twelve public hearings on the findings of the report, letters from business owners and trade associations and interview results from twelve trade associations and 79 owners/managers of transportation firms. Some of the anecdotal evidence indicated discrimination based on race or gender.¹³⁶
- **Race Neutral Measures**—the number of race and gender-neutral measures that Caltrans was going to implement was 150, an increase from 66 race and gender-neutral measures already in place.¹³⁷

Caltrans submitted its proposed program to the US DOT in November 2007, which included a request for a waiver to implement the program only for the four identified groups. The US DOT granted the waiver in 2008, but did not approve Caltrans’ program; its program was approved for fiscal year 2009.

In response, the AGC filed a complaint, alleging that Caltrans’ DBE program was unconstitutional and in violation of the 14th Amendment. As discussed above, the district court found Caltrans’ program constitutional and the AGC appealed. While the appeal was pending, Caltrans commissioned a new disparity study for the research firm to update its preference program as required by the federal regulations. The updated disparity study provided evidence of continuing discrimination in transportation contracting against African Americans, Native Americans, Asian-Pacific Americans, Hispanic Americans and women. On November 29, 2012, the US DOT approved Caltrans’ updated program.

b. Application of *Western States* to Caltrans’ Program

After its discussions regarding mootness and AGC’s lack of standing, the Ninth Circuit held that “even if AGC could establish standing, its appeal would fail. Caltrans’ affirmative action program is constitutional, so long as it survives the applicable level of scrutiny required by Equal Protection jurisprudence.”¹³⁸ Race conscious remedial programs must survive strict scrutiny by showing that these programs meet a compelling governmental interest and are

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 1193.

¹³⁸ *Id.* at 1194-95

narrowly tailored. Gender conscious programs must meet intermediate scrutiny and be “supported by an ‘exceedingly persuasive justification’ and substantially related to the achievement of that underlying objective.”¹³⁹

Evidence of Discrimination

Western States concluded that Washington DOT’s DBE program was not supported by sufficient evidence, as Washington DOT had not conducted any statistical studies nor proffered any anecdotal evidence. Washington DOT merely compared the availability of DBEs to the percentage of contract dollars awarded to DBEs. The Court criticized this analysis as oversimplified and gave it little weight because the statistical analysis did not account for relative capacity of DBEs to perform the work or control for any skewing of utilization of minority businesses caused by the existence of a race and gender-conscious program. The Ninth Circuit struck down Washington DOT’s program as devoid of any evidence of past or present discrimination.¹⁴⁰

Conversely, the Ninth Circuit determined in this case that the race and gender-conscious program was supported by substantial statistical and anecdotal evidence of discrimination. Further, per the court, the study accounted for factors mentioned in *Western States*, as well as adjusted availability data based on capacity and controlling for previously administered DBE programs.¹⁴¹

In response to AGC’s argument that strict scrutiny requires Caltrans to provide evidence of specific acts of deliberate discrimination by Caltrans employees or prime contractors, the Ninth Circuit said this was too broad a reading of *Croson*, as race and gender-conscious programs are designed to “root out ‘patterns of discrimination.’”¹⁴² Caltrans can meet its evidentiary standard, if looking at the evidence in its entirety, the data “show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into ‘a system of racial exclusion practiced by elements of the local construction industry.’”¹⁴³

As it relates to the statistical analysis, the study showed substantial underutilization of African American-, Native American, Asian-Pacific American- and women-owned firms. Further, the statistical analysis was supported by anecdotal evidence.¹⁴⁴ According to the court, AGC provided no persuasive argument for its argument that anecdotal testimony needed to be verified, particularly considering case law in the Fourth and Tenth Circuits stating to the contrary. Additionally, the court rejected the AGC’s argument that that

¹³⁹ *Id.*, quoting *United States v. Virginia*, 518 U.S. 515, 524 (1996)

¹⁴⁰ *Id.* at 1196.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1197, quoting *Croson*, 488 U.S. at 504.

¹⁴³ *Id.*, quoting *Croson*, 488 U.S. at 492.

¹⁴⁴ *Id.*

Caltrans needed to show that every minority-owned business is discriminated against; “[I]t is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.”¹⁴⁵ Lastly, the court stated that the report correctly reflected women as white women, with minority women being included as part of their racial or ethnic group.¹⁴⁶

Narrow Tailoring

In determining narrow tailoring, the court sought to determine whether Caltrans’ DBE program was limited to those minority groups that actually suffered discrimination. Caltrans limited its program to African American, Native American, Asian-Pacific American and women-owned firms. The AGC argued that the DBE program was not narrowly tailored because it did not distinguish its goals between construction and engineering contracts. The Ninth Circuit found that the AGC provided no case that supported this argument and that federal guidelines “instruct states *not* to separate different types of contracts. There are sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors.”¹⁴⁷

d. Consideration of Race-Neutral Alternatives

The Ninth Circuit also disagreed with the AGC’s argument that consideration of race and gender-neutral alternatives was required, prior to the implementation of race and gender-conscious remedies. In contrast, the court stated, *Western States* has never required governmental entities to consider race neutral alternatives before implementing race and gender-conscious goals. *Western States* does not require states to review race neutral alternatives separately, but whether the federal statute sufficiently considered race-neutral alternatives.¹⁴⁸ Even if the court had held such, the narrow tailoring standard would only require “serious, good faith consideration of workable race-neutral alternatives [.]”¹⁴⁹

e. DBE Certification of Discrimination and Application of Goals to Mixed Funded Contracts

The Ninth Circuit quickly discussed and dismissed these two arguments put forth by AGC. Per the court, Caltrans certification process is consistent with federal statutes and does not

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1198.

¹⁴⁷ *Id.* at 1198-1199.

¹⁴⁸ *Id.* at 1199.

¹⁴⁹ *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

require attestation of discrimination by the DBE. Additionally, federal regulations require Caltrans to apply goals to mix funded contracts.¹⁵⁰

The Ninth Circuit held that the AGC did not have standing and that Caltrans' DBE program survived the strict scrutiny standard. Thus, it dismissed the AGC's appeal.¹⁵¹

B. Constitutionality of Proposition 209 considering the Equal Protection Clause

In November 1996, California voters passed Proposition 209, Article 1, §31 of the California Constitution, which went into effect in 1997. The law amended the state constitution to declare “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group based on race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.”¹⁵²

Shortly after its implementation, in *Coalition for Economic Equity v. Wilson (Coalition II)*¹⁵³, the Ninth Circuit upheld the constitutionality of Proposition 209 and found that it did not violate the Equal Protection Clause. The court first questioned if it should be considering the case, given that the California courts did not have the opportunity to issue their opinion on the constitutionality of Proposition 209. The court then determined that because minorities and women constituted a majority of California voters at the passage of Proposition 209, these voters could not be presumed to have placed unique political burdens on themselves.¹⁵⁴ Furthermore, the court found that Proposition 209 prohibited racial classifications and addressed discrimination in a race and gender-neutral manner.

The constitutionality of Proposition 209 considering the Equal Protection clause was also upheld by the California Supreme Court in *Hi-Voltage Wire v. City of San Jose (Hi-Voltage II)*¹⁵⁵. In this case, the California Supreme Court noted that the Ninth Circuit in *Coalition for Economic Equity* had also upheld Proposition 209.

In *Hi-Voltage II*, the court found that there was no conflict between Article 1, §31 and federal law prohibiting discrimination, specifically Title VI of the Civil Rights Act of 1964. Article 1, §31 was inapplicable to any actions required to establish or maintain federal funding.¹⁵⁶ This conclusion was buttressed by the findings in *Coalition II*, which initially found no conflict between Proposition 209 and federal law. The court stated the plain language of the federal

¹⁵⁰ *Id.* at 1200.

¹⁵¹ *Id.*

¹⁵² California Constitution, Article I, § 31(a)

¹⁵³ 122 F.3d 692, 702 (1997).

¹⁵⁴ *Id.* at 704-05.

¹⁵⁵ 24 Cal. 4th 537, 101 Cal. Rptr.2d 653, 12 P.3d 1068 (Cal. 2000)

¹⁵⁶ *Id.* at 676, citing *Coalition v. Wilson*, 122 F.3d 672 (1997).

statutes indicated that they were not intended to be the only law, and that federal laws contemplated state laws involving discrimination.¹⁵⁷

The California Supreme Court spoke to the issue again in *Coral Construction, Inc. v. City and County of San Francisco (San Francisco II)*.¹⁵⁸ The California Supreme Court held that as a recipient of federal funds, San Francisco's MBE/WBE was not exempt from Proposition 209 because the Environmental Protection Agency and the Department of Transportation allows for the consideration of race-based remedies, but does not require them to be utilized under Title VI. The court made a distinction between MBE and WBE programs, where some contracts were funded by federal agencies that did not require race-based remedies and thus subject to Proposition 209, as compared to DBE programs receiving federal assistance and contracts covered under 49 CFR Parts 23, 26.

Although Proposition 209 is constitutional, the courts have been clear that the Equal Protection Clause outweighs Proposition 209. Considering this, the result is that several areas of California law regarding Proposition 209 remain unsettled.

1. Political Structure Doctrine

In its efforts to defend its MBE/WBE program discussed above, the City of San Francisco, in *San Francisco II*, attempted to argue that Proposition 209 violated the Political Structure Doctrine espoused by the U.S. Supreme Court in *Washington v. Seattle School District (Seattle)*. The Political Structure Doctrine "that emerges from these decisions is perhaps best summarized in the Seattle majority's statement that 'the Fourteenth Amendment...reaches 'a political structure that treats all individuals as equals,'...yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation. (*Seattle*, supra, 458 U.S. 457, 467, quoting *Mobile v. Bolden* (1980) 446 U.S. 55, 84 (con. opn. of Stevens, J))."¹⁵⁹ The California Supreme Court found that, while the Fourteenth Amendment protects against political obstructions to *equal treatment*, it does not provide protection to political obstructions against *preferential treatment*. Given that Proposition 209, per the court, seeks to ensure equal treatment by eliminating preferential treatment, it is not in violation of the Fourteenth Amendment.¹⁶⁰

The U.S. Supreme Court recently considered a similar issue in *Schuette v. Coalition to Defend Affirmative Action*.¹⁶¹ This case reviewed Proposal 2, now Michigan Constitution Art. I, §26, which prohibited the utilization of racial preferences in higher education

¹⁵⁷ *Coalition at 710*.

¹⁵⁸ 50 Cal.4th 315 (2010)

¹⁵⁹ *San Francisco II* at 330.

¹⁶⁰ *Id.* at 333.

¹⁶¹ 134 S.Ct. 1623, 188 L. Ed. 2d 613 (2014). BART submitted an Amicus Curiae Brief in this case.

admissions. The question before the Court per Justice Kennedy, like that in *Coalition II* and *San Francisco II*, was not “how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued.”¹⁶² The Court held that there was no authority in the Constitution that would allow the Judiciary to set aside the will of the voters as expressed in Proposal 2.

2. Race-Conscious Remedies under Proposition 209—Federal Compulsion Doctrine

Even with the holdings that Proposition 209 is permissible and constitutional, the courts have not stated that race-conscious remedies banned by Proposition 209 are completely prohibited. In *Croson*, the U.S. Supreme Court held that governments have the authority to eradicate discrimination within their jurisdictions. Given the supremacy of the Equal Protection Clause, the California courts appear to struggle with determining if they can deny governments the ability to utilize race-conscious remedies if other remedies are likely to be ineffective in addressing discrimination.

The underlying analysis conducted by the courts determines if the Equal Protection Clause and/or federal statute *requires* or *permits* the utilization of race and gender-conscious remedies. Both the California courts and the Ninth Circuit are clear that Proposition 209 does not preclude state agencies from meeting federal requirements necessary to maintain federal funding. However, when federal requirements permit the utilization of race and gender-conscious remedies, Proposition 209 should be upheld in most cases.

Although the court of appeal in *Hi-Voltage II* stated that Proposition 209 does not contain a compelling governmental interest exception, the court did not completely close the door stating “we question the City’s implicit premise that its Program meets the federal equal protection standard...[t]he disparity study is not a part of the record in this case. Without it, the court has no basis for measuring the fit between the Program and the goal of eliminating a disparity in the amount of contract dollars awarded MBE’s in comparison to non-MBE’s.”¹⁶³ Further the court held that “where the state or a political subdivision has intentionally discriminated, use of a race-conscious or race-specific remedy necessarily follows as the only, or at least the most likely, means of rectifying the resulting injury.”¹⁶⁴

In *Connerly v. State Personnel Board*¹⁶⁵, the California Court of Appeals found “[u]nder equal protection principles, all state actions that rely upon suspect classifications must be tested under strict scrutiny...[t]o the extent the federal Constitution would permit, but not require,

¹⁶² *Id.* at 1636.

¹⁶³ *Hi Voltage II* at 676.

¹⁶⁴ *Id.* at 675.

¹⁶⁵ 92 Cal. App. 4th 16 (2001).

the state to grant preferential treatment to suspect classes, Proposition 209 precludes such action.”¹⁶⁶

In *C&C Construction, Inc. v. Sacramento Municipal Utility District*¹⁶⁷, the court of appeals concluded that “[b]ecause the regulations require affirmative action to remediate past discrimination and affirmative action may be either race-based or race-neutral, SMUD cannot impose race-based affirmative action unless it can establish that it cannot remediate past discrimination with race-neutral measures.”¹⁶⁸ Again, the court found that the federal laws in question “permit”, but do not “require” the utilization of race-based affirmative action measures.¹⁶⁹

This issue of utilization of race and gender-conscious remedies on MWBE programs, as opposed to federally mandated DBE programs, seems to have come to a head in *San Francisco II*. The court of appeals held that determining if the federal Equal Protection Clause requires race-conscious goals as a remedy is a question of fact and not a question of law. It remanded the case to the Superior Court to determine this issue. The court stated that “[w]hile the parties have not brought to our attention any decision ordering a governmental entity to adopt race-conscious public contracting policies under the compulsion of the federal equal protection clause, the relevant decisions hold open the possibility that race-conscious measures might be required as a remedy for purposeful discrimination in public contracting.”¹⁷⁰ The court established the following four-part test (each requirement must be met):

- 1) The public entity purposefully or intentionally discriminated against MBEs and WBEs;
- 2) That the purpose of the legislation is to provide a remedy for such discrimination;
- 3) That the ordinance is narrowly tailored to achieve that purpose; and,
- 4) That a race and gender-conscious remedy is necessary as the only, or at least the most likely, means of rectifying the resulting injury.¹⁷¹

¹⁶⁶ *Id.* at 42.

¹⁶⁷ 122 Cal. App. 4th 284 (2004)

¹⁶⁸ *Id.* at 312.

¹⁶⁹ *Id.* at 310.

¹⁷⁰ *San Francisco II* at 337.

¹⁷¹ *Id.* at 337-338.

3. Compelling Governmental Interest Standard

As stated above under *San Francisco II*, the California courts have interpreted *Croson* and other U.S. Supreme Court cases as requiring a showing of intentional or purposeful discrimination under compelling governmental interest. This standard was also espoused in *Hi-Voltage II*, where the court stated “[t]he City’s disparity study, at best creates only an inference of discrimination against MBE/WBE subcontractors by prime contractors; it does not establish intentional acts by the City.”¹⁷²

The standard established by the California courts appears to conflict with the standard established by the Ninth Circuit. In upholding Caltrans’ DBE program in 2013, the Ninth Circuit in *Caltrans* clearly stated that *Croson* does not require a showing of deliberate or intentional discrimination.

Moreover, a rule requiring the state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. This Court has previously rejected a similar interpretation of *Croson*. See *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1416 n. 11 (9th Cir. 1991) (AGCC II)...We reject AGC’s argument that Caltrans’ program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination.¹⁷³

Both the California court and Ninth Circuit opinions must be viewed considering the June 2015 U.S. Supreme Court case, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*¹⁷⁴. In upholding the applicability of the disparate impact liability to the Fair Housing Act,

In a similar vein, a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity. A robust causality requirement ensures that “[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact” and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. v. Antonio*, 490 U. S.

¹⁷² *Hi Voltage II* at 675.

¹⁷³ *Caltrans* at 1197.

¹⁷⁴ No. 13-1371, 576 U. S. (2015)

642, 653 (1989), superseded by statute on other grounds, 42 U. S. C. §2000e–2(k).¹⁷⁵

...Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities, rather than solely “remov[ing] . . . artificial, arbitrary, and unnecessary barriers.” *Griggs*, 401 U. S., at 431. And that, in turn, would set our Nation back in its quest to reduce the salience of race in our social and economic system.¹⁷⁶

C. Constitutionality of MWBE Outreach and MWBE Reporting Requirements Under Proposition 209

1. Outreach

The California courts in *Hi-Voltage Wire* and *Connerly* have established that targeted or focused outreach is unconstitutional, but inclusive outreach is permissible.

In *Hi-Voltage I*, the court found that contractors were required to give personal attention and consideration to MBE/WBEs that was not required to be given to non-MBE/WBE subcontractors. Outreach included sending written notice to four certified MBE/WBEs for each trade area identified by the project; following up the solicitation letter by contacting the MBE/WBEs to ascertain their interest in participating in the project; and negotiating in good faith with any interested MBE/WBE and not unjustifiably rejecting any MBE/WBE bid. Because the prime contractor could not unjustifiably reject as unsatisfactory bids prepared by any MBE or WBE, the court stated that this requirement gave a distinct preference to MBE/WBEs.¹⁷⁷ The California Supreme Court confirmed the appeals court findings.¹⁷⁸

Connerly supported the opinion in *Hi-Voltage I and II* and further expounded on acceptable outreach stating that “outreach or recruitment efforts which are designed to broaden the pool of potential applicants without reliance on an impermissible race or gender classification are not constitutionally forbidden.”¹⁷⁹

¹⁷⁵ Slip Op., at 19-20.

¹⁷⁶ Slip Op., at 22.

¹⁷⁷ *Hi-Voltage v. San Jose*, 84 Cal. Rptr. 2d 885, (Cal.Ct.App. 1999)

¹⁷⁸ *Hi-Voltage v. San Jose*, 101 Cal Rptr. 653, 671 (2000).

¹⁷⁹ *Connerly*, at 46.

2. Monitoring and Reporting

In *Connerly*, the Court of Appeals found that monitoring and reporting on MWBE participation is not only constitutional, but also serves a valuable purpose. Per the court, there are four areas where reporting may be of assistance:

- 1) To indicate a need to determine whether specific discrimination is occurring;
- 2) To aid the Legislature in determining whether race and gender-neutral remedies are needed;
- 3) To aid the Legislature in determining whether a scheme that does not employ suspect classifications, such as an inclusive outreach scheme, is warranted; and,
- 4) To indicate no further legislative action is need.¹⁸⁰

D. Constitutionality of Non-Discrimination Programs Under Proposition 209

In reviewing the *Hi-Voltage II* case, most of the attention is on the court's rulings regarding requirements for outreach and MBE/WBE participation and the constitutionality of such efforts. As discussed previously, the California Supreme Court found that inclusive outreach is allowable while targeted outreach is not. However, *Hi-Voltage II* also focused on determining if the components of San Jose's "Nondiscrimination/Nonpreferential Treatment Program Applicable to Construction Contracts in excess of \$50,000.00" amounted to preferential treatment. The court reasoned that these requirements were in fact preferential.¹⁸¹ Nondiscrimination programs that required focused attention on MBEs and WBEs are not considered race and gender-neutral and are unconstitutional under California law.

San Jose's program included Documentation of Outreach or Documentation of Participation. Participation allowed bidders to invoke an evidentiary presumption of nondiscrimination by listing enough MBE/WBE participants in the bid. If the bid included the number of MBE/WBE subcontractors to be expected in the absence of discrimination, the City presumed no discrimination had occurred. For each project, the City determined the percentage of MBE/WBE firms that would be expected, absent discrimination per several factors, including the number of potential subcontracting opportunities and the number of available MBE/WBE firms. If a bidder failed to demonstrate strict compliance with either of these two options, his or her bid was deemed "nonresponsive" and was rejected.¹⁸²

While the court may have found San Jose's Nondiscrimination program tantamount to a goal-based program, it discussed the City's intention for it to be a Nondiscrimination program and

¹⁸⁰ *Id.* at 63.

¹⁸¹ *Hi-Voltage II* at 674.

¹⁸² *Id.* at 657.

the impermissible requirements of these types of programs under Proposition 209. The court observed the following finding the Nondiscrimination program to be in violation of Article I, § 31:

- 1) The City's Program essentially places on a contractor the burden of disproving a negative. Without any prima facie proof of past misconduct, a contractor must establish its responsibility as a bidder by showing it does not discriminate on an impermissible basis in its subcontracting. As with any requirement that utilizes preferences, this completely inverts the normal procedures for making discrimination claims.¹⁸³
- 2) Furthermore, a contractor may show nondiscrimination only in a manner designated by the City, either per a fixed participation goal or by prescribed outreach to MBEs and WBEs. In other words, it can only prove it does not discriminate against minorities and women by discriminating or granting preferences in their favor.¹⁸⁴

In 1997, BART adopted its Non-Discrimination Program for Subcontracting on Non-Federally Funded contracts (ND Program). Under the terms of the program, the purpose is to ensure that contractors do not discriminate or give a preference in award of subcontracts based on race, national origin, color, ethnicity or gender.

The Program does not require a bidder to subcontract any portion of the work. If bidder does not subcontract any of the work, the Program does not apply. Further, the Program does not utilize subcontracting percentage goals nor require a bidder to make good faith efforts to utilize minority (MBE) and women (WBE) subcontractors.

However, if the bidder does not subcontract a portion of the work, a determination is first made whether the bidder has listed subcontracts in dollar amounts that reflect the availability of percentages of MBEs and WBEs in the pool of all subcontractors available to perform the subcontract work. The availability percentages for MBEs and WBEs are not subcontracting goals. They are, instead, what MBE and WBE participation would be expected in the absence of discrimination. If the bidder meets availability percentages, the bidder is presumed not to have discriminated and is eligible for award of the contract.

If the bidder does not meet the availability percentages, the bidder must supply documentation pertinent to determining if the bidder discriminated. If the documentation

¹⁸³ *Hi-Voltage* at 672.

¹⁸⁴ *Id.*

shows no evidence of discrimination, the bidder is recommended for award of the contract. If the documentation shows discrimination, a hearing is set before a hearing officer and the District has the burden to prove that the bidder discriminated. A bidder is non-responsive only if a finding is made after the hearing that the bidder has discriminated in the award of subcontracts. A bidder cannot be found non-responsive simply because it did not select subcontractors in a manner which reflects MBE and WBE availability if it has not discriminated.

Although the Non-Discrimination Program adopted by the City of San Jose was struck down as violating proposition 209 in the *High-Voltage* case, BART's ND Program is distinguishable. Under BART's ND Program, failure to meet the availability percentages (1) triggers only an obligation to provide information, (2) does not result in an obligation to make good faith efforts to attract MBEs or WBEs and (3) cannot provide a basis for finding a bidder non-responsive.

2.3 FACTUAL PREDICATE STANDARDS (CONDUCTING THE DISPARITY STUDY)

The factual predicate is utilized to determine whether a compelling governmental interest exists to support the utilization of race and gender-conscious remedies. The disparity study is utilized to develop the factual predicate. Below is a discussion of the courts' review of the sufficiency of several components of the disparity study in establishing a factual predicate.

2.3.1 RELEVANT MARKET VS. JURISDICTIONAL REACH

Relevant market establishes geographical limits to the calculation of M/W/DBE availability and utilization. Most courts and disparity study consultants characterize the relevant market as the geographical area encompassing most of a public entity's commercial activity. Relevant market can be different from jurisdictional reach, which defines the reach of the race and gender-conscious program implemented. Relevant market has not been litigated much.

In *Croson*, the Supreme Court did not provide specific guidance on the estimation of relevant market for the purposes of conducting a factual predicate study. While *Croson* did not provide particularized guidance on the estimation of the relevant market, the *Croson* Court did require that an MWBE program cover only those groups that have been affected by discrimination within the public entity's jurisdiction.¹⁸⁵ This position was also taken by both the Ninth and Tenth Circuits. In *Concrete Works I*, the consultant found that over 80 percent of Denver's construction and design contracts were awarded to vendors in the Denver MSA.¹⁸⁶ The district court found the Denver MSA to be relevant to determining the jurisdiction of Denver's contract awards. The district court cited the Ninth Circuit opinion in *Coral Construction v. Kings County*:

Concrete Works also overlooks the fact that the Court of Appeals found even the ultimately rejected Pierce County evidence to be probative, even though it was from a separate jurisdiction, because:

"It is, however, immediately adjacent to King County and is part of the same metropolitan area. Likewise, the world of contracting does not conform itself neatly to jurisdictional boundaries. In this regard, contracting differs markedly from a school system, which conducts its business in relative isolation from other school systems. *Id.*"

¹⁸⁵ *Richmond v. Croson*, at 725.

¹⁸⁶ 823 F.Supp. 821, 836 (1993).

We conclude that Denver is not acting outside its jurisdiction, but is applying a policy to those contractors who have been found to choose to enter Denver's boundaries to seek work and win Denver's tax dollars.¹⁸⁷

2.3.2 AVAILABILITY

Availability calculations determine the number of firms who are ready, willing and able to do business with a public entity. Disparity ratios are determined by comparing availability to actual utilization. Availability measures are the most questioned and litigated portions of a disparity study, given the challenges in developing an accurate head count of firms in the marketplace, accounting for issues of capacity, qualification, willingness, and ability. As such, this section explores the evolution of judicial opinions on availability. As BART reviews the availability methodology for federally funded contracts, it is important to note that under the US DOT Goal Setting methodology, there are 5 Acceptable Methods of Establishing Relative Availability in calculating Step 1:

- 1) Bidders list
- 2) Census data and DBE directory
- 3) Disparity Study
- 4) Goal of Another DOT Recipient, if same or substantial similar market
- 5) Alternate method

Regardless of the relative availability methodology used, the formula to be used in calculating actual relative availability is the number of DBEs ready, willing, and able to bid for the types of work BART will fund in the upcoming year, divided by the number of all firms (DBEs and non-DBEs) ready, willing, and able to bid for the types of work BART will fund that year.¹⁸⁸

Under Step 2, BART may also “adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies.”¹⁸⁹

¹⁸⁷ *Id.* The district court also cited *AGC v. City of San Francisco*. See *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 934 (9th Cir.1987) (“*AGCC I*”) (noting that any plan that extends race-conscious remedies beyond territorial boundaries must be based on very specific findings that actions the city has taken in the past have visited racial discrimination on such individuals).

¹⁸⁸ <http://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>.

¹⁸⁹ *Western States Paving*, at 989.

We note that the judiciary’s view of availability within a jurisdiction is heavily influenced by the disparity methodology utilized to justify the DBE or MWBE program under review. In many cases, the judge determines the validity of a particular methodology without declaring it as the only acceptable availability methodology.

The *Croson* decision did not turn on the evaluation of data in a disparity study. Consequently, *Croson* did not provide a detailed discussion of permissible data sources. Instead, the Court admonished local agencies to compare contract awards to MWBEs to the number of “available” minority firms seeking public sector work, and not to the minority population. The source of this availability data was never addressed. Early case law following *Croson* did not cover the issue of competing measures of MWBE availability. Several cases did not cite the sources of availability data.¹⁹⁰

In the mid-1990s, cases applying *Croson* began to address the use of Census data as a measure of MWBE availability. The basic criticism the courts had of Census data is that Survey of Minority-owned Business Enterprises (SMOBE) and Survey of Women-owned Business Enterprises (SWOB) data did not indicate which firms were seeking public sector work.¹⁹¹ For example, in *Engineering Contractors Association of South Florida v. Metropolitan Dade County*,¹⁹² the district court stated:

“The census [SMOBE] data used in both [disparity] studies simply represent individuals or firms located in Dade County, which list themselves as being in the business of construction. The census data do not identify whether these entities have ever done work specifically for the county, or to what degree their reported sales or income stems from private sources versus public sources, much less whether the earnings are primarily the result of work done for Dade County versus Broward County, Palm Beach County or some other Florida locale, or even sites outside of Florida. This lack of specificity makes it difficult, if not impossible, to draw accurate conclusions concerning whether Dade County is itself a participant in gender, racial or ethnic discrimination to the extent that it justified its use of race, ethnicity, and gender-conscious remedies.”¹⁹³

The Census Bureau’s Public Use Micro Sample (PUMS) data has been criticized for similar reasons. One of Miami’s disparity studies used PUMS data to study business formation amongst minorities. The district court concluded that, because PUMS did not look at public

¹⁹⁰See, e.g., *Cone Corp. v. Hillsborough*, 908 F.2d 908 (11th Cir. 1990).

¹⁹¹Census no longer produces these sources of data.

¹⁹²943 F.Supp. 1546 (1996).

¹⁹³*Id.* at 1572-1573.

sector contracting, the PUMS “is not the type of particularized evidence that is required to provide a strong basis in evidence for the County’s race- and ethnicity-conscious contract award process, which is aimed at MWBEs which are already in business and qualified to perform work.”¹⁹⁴

The District Court for the Southern District of Ohio had similar criticisms of the use of Census data. The court stated, “It is apparent, however, that not all construction firms in the Columbus MSA are qualified, willing and able to bid on City construction contracts.”¹⁹⁵ The court went on to state that “census data probably overstate the proportions of available [MWBEs] . . .”¹⁹⁶ Nevertheless, the court still preferred Census data to study disparity among subcontractors. The court concluded that, “[w]hile the Census total industry data have limitations, it appears to be the best data considered by [the disparity study consultant] for use in determining availability of MWBEs as subcontractors.”¹⁹⁷ In fact, the Ohio district court rejected the use of the bidder registration file list because it was not consistent with the SMOBE data.

The District Court for the Eastern District of Pennsylvania in Philadelphia also had similar criticisms of SMOBE and SWOB data. In its review of the evidence of disparity presented, the court, stated:

[The evidence of disparity] never measured the number of contractors actually engaged by the City to perform particular services . . . Without measuring the number of contractors actually engaged by the City to perform particular services, it is impossible to determine whether Black firms were excluded from performing these services. In addition, it is impossible to determine whether Black companies even existed to perform these services required by the City. Without examining this information, it is impossible to draw any conclusions about discrimination in City public works contracting. In sum, the court finds that [the disparity study consultant] failed to measure the “relevant statistical pool” necessary to perform an accurate disparity study in accordance with the standards set forth in *Croson*.¹⁹⁸

Upon review of the lower court decision, the Third Circuit Court of Appeals was more lenient on the use of SMOBE and SWOB data. The court rejected the argument that census data did not measure those willing to undertake public sector contracting. The court stated, “In

¹⁹⁴*Id.* at 1574.

¹⁹⁵*AGC v. City of Columbus*, 1996 U.S. Dist. Lexis 12519 (SD Ohio 1996), at 22. This case was overturned on jurisdictional grounds.

¹⁹⁶*Id.* at 22.

¹⁹⁷*Id.* at 26.

¹⁹⁸*Contractors Assn. of Eastern Pennsylvania v. City of Philadelphia*, 1995 WL 11900 (ED Pa 1995), at 13.

the absence of some reason to believe otherwise, one can normally assume that participants in a market with the ability to undertake gainful work will be ‘willing’ to undertake it.”¹⁹⁹ The court went so far as to state “the census data offer a reasonable approximation of the total number of firms that might vie for City contracts.”²⁰⁰ The court further suggested that census data might *understate* MBE availability, because “past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure this work.”²⁰¹

The general criticism of SMOBE and SWOB data is the lack of detail and specificity in qualifications. For example, in criticizing the disparity study in Miami, the District Court for the Southern District of Florida stated “[t]he major drawback of this analysis [disparity ratios] is that the SMOBE data relied upon do not include information such as firm size, number of employees, etc., thus the Brimmer Study does not contain regression analyses to control for neutral variables that could account for these disparities.”²⁰² The district court did not suggest an alternative data source to provide the specificity it was seeking. This omission was not unusual because courts generally did not provide guidance in determining valid or invalid sources of MWBE availability data.

Similarly, geographical mismatching of the data sets raised concern for some courts about the use of SMOBE data. The district court in Ohio, for example, criticized mixing SMOBE data with *County Business Patterns* because of the different geographical scopes,²⁰³ ignoring the fact that one is a measure of firms and the other is a measure of establishments.²⁰⁴

Other courts have not been concerned with the absence of such detail in Census data. For example, the Third Circuit Court also was not concerned by the lack of qualification data in the SMOBE data set. The court noted that “[t]he issue of qualifications can be approached at different levels of specificity, however, and some consideration of the practicality of various approaches is required. An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”²⁰⁵ The court accepted the mixture of census data with city purchasing data, although they differed in geographical scope. Similarly, a federal court of appeals sitting in Denver stated, “[w]e agree with other circuits which have interpreted [that] *Croson* implied to permit a municipality to rely, as does Denver, on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger’s Summary Judgment motion or request for a preliminary

¹⁹⁹ *Contractors Assn. of Eastern Pennsylvania v. City of Philadelphia*, No. 89-cv-02737 (3d Cir 1996), at 36.

²⁰⁰ *Id.* at 39.

²⁰¹ *Id.* at 36.

²⁰² *Engineering Contractors Association of South Florida v. Metropolitan Dade County*, supra n. 5, at 31.

²⁰³ *AGC v. City of Columbus*, supra n. 8, at 18, *vacated on jurisdictional grounds*.

²⁰⁴ An enterprise (firm) may have several establishments at various locations.

²⁰⁵ *Contractors Assn. of Eastern Pennsylvania v. City of Philadelphia*, supra n. 12, at 36.

injunction.”²⁰⁶

The principal alternative to using Census data to measure MWBE availability in *Croscon* factual predicate studies is using lists of marketplace participants, primarily, vendor, bidders, pre-qualification and certification lists. The *Ready, Willing and Able* (RWA) approach is a list-based approach to the estimation of MWBE availability. In the late 1990s, partly in response to the *Engineering v. Dade County* case, list-based approaches were utilized.²⁰⁷ As such, courts began to focus on these types of availability analysis.

In 2005, in *Northern Contracting, Inc. v. Illinois Department of Transportation*²⁰⁸, the district court found that a valid statistical methodology was presented to justify that the DBE program was narrowly tailored. This methodology included six steps: (1) identified the geographic market for contracting as the State of Illinois; (2) identified the product markets (i.e. highways, transportation, engineering, housing, etc.); (3) identified all available contractors in each product market regardless of race, using Dun & Bradstreet; (4) identified the number of DBE contractors in each product market and broke the numbers down by geographical location; (5) corrected errors by updating the qualified DBE firm list to eliminate firms that are no longer qualified; and (6) correct errors by accounting for DBE firms that were not listed on the qualified directory.²⁰⁹

The availability analysis in *Northern Contracting* represented what is commonly called “custom census” availability. A similarly methodology was employed in the Caltrans’ disparity study. In *Caltrans*, the Ninth Circuit citing *Northern Contracting*, held that federal guidelines state the availability analysis should not separate contracts by construction and engineering and by prime and subcontractor because there was already substantial overlapping in these areas.²¹⁰ Furthermore, the court found that the consultant had adjusted availability for the capacity of firms to do the work.²¹¹

Conversely, the court in *Rothe Development Co. v. U.S. Department of Defense* found that the appropriate measure of availability is to determine those firms “ready, willing, and able” to do business with the government. The court found the following sources as tending to establish a business’ qualifications—awardees, bidders, and certification lists. The reliance on lists compiled by local business associations, by community outreach, from vendor lists and from self-affirmation of qualification and ability is more questionable.²¹²

²⁰⁶ *Concrete Works v. City and County of Denver (Concrete Works II)*, 36 F.3d 1513, 1529 (10th Cir. 1994).

²⁰⁷ D.J. Miller & Associates, Inc. (now Miller³ Consulting, Inc.) used a Ready, Willing and Able list-based approach from its inception in 1988.)

²⁰⁸ 473 F.3d 715 (7th Cir. 2007)

²⁰⁹ *Id.* at 719.

²¹⁰ See also *Mountain West Holding v. State of Montana* and *Geyer Signal, Inc. v. MnDOT*.

²¹¹ *Caltrans* at 1199.

²¹² *Rothe Development Corp v. U.S. Department of Defense*, 545 F.3d 1023, 1042 (2008)

In *H.B. Rowe Co. v. Tippett*²¹³, the 4th Circuit found acceptable an availability analysis that depended on the following variables: “a vendor list comprising (1) subcontractors approved by the Department to perform subcontract work on state-funded projects, (2) sub-contractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts.”²¹⁴ The court agreed with the consultant’s explanation why prime and subcontractors were not separated.

2.3.3 UTILIZATION

Utilization analysis measures the actual dollars awarded and paid to firms doing business with the public entity, by race and gender. The utilization analysis is rather straightforward, thus there is limited discussion in case law on standards for utilization. The *Croscon* decision specifically mentions the number of firms “qualified, willing and able to perform . . . and the number of such contractors actually engaged”.

In *Concrete Works III*, the court stated that the presentation of both goal and non-goal contracts provided a clearer picture of MBE participation. In fact, the court found that “non-goal projects were a better indicator of discrimination in City contracting.”²¹⁵

Illinois Department of Transportation (IDOT), in *Northern Contracting*, tried to test for the impact of race-conscious programs on DBE participation with its Zero-Goal Program. This program dropped the DBE goal from select construction contracts to see if there would be a decrease in the number of DBE participants compared to those projects with a DBE goal. However, the court found the experiment flawed because the State did not provide the number of DBEs that bid on these projects or the dates during which these experiments took place. As such, the court was unable to conclude that the drop-in DBE participation was due to the lack of an affirmative action program.²¹⁶

In *Caltrans*, the Ninth Circuit noted that the disparity consultant utilized state-funded contracts, which did not have goals, to determine if the affirmative action program for federally-funded contracts skewed the data. The court further found that the consultant appropriately accounted for women, by combining minority women with the requisite minority group, thus the women category only included white women.²¹⁷

²¹³ 615 F.3d 233 (2010).

²¹⁴ *Id.* at 245.

²¹⁵ *Concrete Works III* at 988.

²¹⁶ *Northern Contracting* at 719.

²¹⁷ *Caltrans* at 1198.

2.3.4 DISPARITY RATIOS

The most important part of the statistical analysis is the disparity ratio, which is a comparison of availability to utilization. An inference of discrimination can be drawn from statistically significant disparity. The courts agree on the calculation of disparity and statistical significance, as discussed below.

In *Adarand VII*, the Tenth Circuit noted that “the disparity between minority DBE availability and market utilization in the subcontracting industry raises an inference that the various discriminatory factors the government cites have created that disparity... Of course, it would be "sheer speculation" to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Croson*, 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiable) higher, but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.”²¹⁸

In *Rowe*, the court there noted that several courts have followed a similar methodology:

After *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women- owned businesses. *See, e.g., Rothe II*, 545 F.3d at 1037-38; *Concrete Works*, 321 F.3d at 962-63; *W.H. Scott*, 199 F.3d at 218; *Eng’g Contractors*, 122 F.3d at 914; *Contractors Ass’n I*, 6 F.3d at 1005; *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1413-14 (9th Cir. 1991). Generally, courts consider a disparity index lower than 80 as an indication of discrimination. *See Rothe II*, 545 F.3d at 1041; *Eng’g Contractors*, 122 F.3d at 914; *see also* 29 C.F.R. § 1607.4(D) (2010) (directing federal agencies to regard a "selection rate" of lower than 80 percent as evidence of disparate impact employment discrimination).²¹⁹

Further, the court found that the application of t-test²²⁰ was appropriate, as standard deviation test allows a determination of whether any disparity found is merely due to chance or due to some other reason. The court supported its argument by citing a mid-90s case, *Engineering Contractors*, 122 F.3d at 914.²²¹

²¹⁸ *Adarand v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

²¹⁹ *Id.* at 244.

²²⁰ T-test determines statistical significance of any disparity found. The t-test assesses whether two groups are statistical different from each other.

²²¹ *Id.*

In finding the disparity study sufficient in *Caltrans*, the court noted that disparities were assessed across a variety of contracts by funding source (state or federal), type of contract (prime or subcontract) and type of project (engineering or construction).

2.3.5 CAPACITY AND REGRESSION

Parties seeking to explain what the U.S. Supreme Court meant in *Croson* usually raise the capacity issue of qualified minorities. The Capacity and Regression analysis seeks to determine the factors, including size, race and gender among others, that are contributing to any disparity found as a result of comparing availability and utilization.

In *Concrete Works I*, the district court reviewed the challenged availability/utilization analysis submitted by the City and County of Denver. The Concrete Works Company challenged the use of availability measures and suggested that the appropriate standard was capacity. The court provided a lengthy discussion of the capacity arguments:

Capacity, as Concrete Works' expert economist points out, is ideally measured by the total amount of business that could be handled by MBEs. There are typically three measures used to predict the amount of business that W/MBEs can handle: the number of W/MBE companies relative to the total number in the industry (also known as 'availability'), W/MBE revenue as a percent of industry revenue, and the number of W/MBE employees as a percent of the industry total . . . [A]s evidenced both by Concrete Works' failure to suggest an alternative way to measure capacity and the admission of its expert that availability is more often used in actual practice, the ability of a firm to handle any given amount of business is exceedingly difficult to define and even more difficult to quantify. Capacity is a function of many subjective, variable factors. Second, while one might assume size reflects capacity, it does not follow that smaller firms have less capacity; most firms have the ability and desire to expand to meet demand. A firm's ability to break up a contract and subcontract its parts make capacity virtually meaningless . . . Finally, Concrete Works can cite no authority for its assertion that its amorphous, ambiguous conception of capacity is required. No court to date has required a comparison of a firm's 'ability to handle work.'²²²

In *Concrete Works III*, the Tenth Circuit reviewed those variables that CWC alleged the disparity studies had not controlled for and made the following findings:

²²² *Concrete Works I* at 838-39.

- a. ***Size and experience:*** CWC did not conduct its own disparity study that controlled for firm size and experience. “Denver is permitted to make assumptions about capacity and qualification of M/WBEs to perform construction services, if it can support those assumptions. The assumptions made in this case are consistent with the evidence presented at trial, and support the City’s position that 1) a firm’s size does not affect its qualifications, willingness, or ability to perform construction services and 2) that the smaller size and lesser experience of M/WBEs are, themselves, the result of industry discrimination.”²²³
- b. ***Specialization:*** CWC offered no support for its view that M/WBEs are clustered in certain construction specialties and did not demonstrate that disparities are eliminated when there is control for firm specialization. On the other hand, the disparity study consultant controlled for SIC code subspecialty and still showed disparities.²²⁴
- c. ***Bidding:*** Disparity studies must make the same assumptions about availability for *all* firms. It is unnecessary to consider only those firms bidding on Denver’s projects because it does not indicate qualification.²²⁵

The Ninth Circuit has also discussed the issue of capacity. In *Western States*, the Court found Washington DOT’s capacity analysis to be flawed because:

- It considered contracts that had affirmative action components and thus, did not reflect “the performance capacity of DBEs in a race-neutral market;
- While Washington DOT could only rely on a comparison of the proportion of State DBE firms/percentage of awards to DBEs on race-neutral contracts, this “oversimplified statistical evidence is entitled to little weight, however, because it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work.”
- The State’s analysis does not control for any capacity factors, such as size and experience.²²⁶

The court noted that under 49 CFR Part 26, the US DOT has established that availability can be adjusted upward or downward, based on the capacity of DBEs to perform work, as measured by the volume of work allocated to DBEs in recent years. While it disagreed with

²²³ *Concrete Works III* at 982.

²²⁴ *Id.* at 983.

²²⁵ *Id.*

²²⁶ *Western States* at 1000.

the way Washington DOT relied on capacity information to defend its DBE program, the court did find that Washington DOT had closely tracked US DOT regulations.²²⁷

The Ninth Circuit contrasted the analysis performed by the Washington DOT and that performed by Caltrans. In Caltrans, the Court found the statistical analysis valid, as Caltrans had adjusted availability for capacity and controlled for previously administered affirmative action programs.

In *Engineering Contractors*, the Eleventh Circuit found acceptable as a valid explanation for disparities found, Census data showing that, on average, that non-MBE/WBE firms were larger than MBE/WBE firms. It found unreliable the data submitted by the County to explain disparities found. The County presented an analysis of a sample of 568 firms out of 10,462 that had filed a certificate of competency with Dade County as of January 1995. The County's expert collected data on these firms related to race, ethnicity, gender, as well as total sales and receipts and sought to determine whether there was a meaningful relationship between the two pools of data. The expert conducted a regression analysis, using number of employees as a proxy for size.

The Eleventh Circuit found that that the statistical pool of firms relied upon by the County was significantly larger than the actual number of firms willing, able and qualified to do the work, particularly given that these firms represented those firms simply licensed as construction contractors.²²⁸ Further, the court held that, after controlling for firm size, neither BBE nor WBE data revealed statistically significant disparities and that the district court was not required to assign any disparities controlling weight.²²⁹

In *Rothe*, the court found the most reliable way for accounting for firm size, without changing the disparity-ratio methodologies, was to employ "regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it."²³⁰

In *Rowe*, the court also found the State's regression analysis useful. In that study, the State studied the impact of certain business characteristics on a firm's gross revenues. These characteristics included company age, number of full-time employees, owner's years of experience, level of education, race, ethnicity and gender. The State supported the capacity analysis by reviewing the participation of minorities at different contract thresholds.²³¹

²²⁷ *Id.* at 989.

²²⁸ *Engineering Contractors* at 921.

²²⁹ *Id.*

²³⁰ *Rothe* at 1045.

²³¹ *Rowe* at 247.

2.3.6 ANECDOTAL

Croson indicated that some measure of anecdotal evidence could be supportive in a determination of discrimination. However, it did not provide a clear picture on the type and quantum of anecdotal evidence required. Many lower courts have reviewed and assessed the quality and quantity of anecdotal evidence submitted. In *Concrete Works I*, the District Court accepted the testimony of 21 people at a public hearing and the interview results of 38 MWBEs as enough anecdotal evidence for *Croson* purposes.²³²

In *Caltrans*, the consultant included 12 public hearings, received letters from business owners and trade associations and interviewed 79 owners/managers of transportation firms. The Ninth Circuit found that “the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination.”²³³

Rothe criticized the disparity analysis because it did not include direct testimony from MBEs regarding their experience with the U.S. Department of Defense (DOD) or its prime contractors.²³⁴ The court sought anecdotal testimony that demonstrated some link between the DOD’s spending practices and discrimination.

Opponents have long argued that anecdotal testimony should be verified. However, more and more circuits are concluding as *Concrete Works* did:

“Anecdotal evidence is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions. In this case, the anecdotal evidence was not subject to rigorous cross-examination...Denver was not required to present corroborating evidence and CWC was free to present its own witnesses to either refute the incidents described by Denver’s witnesses or to relate their own perceptions on discrimination in the Denver construction industry.”²³⁵

In *Caltrans*, the Ninth Circuit made it clear that anecdotal testimony did not need to be verified, particularly considering case law in the Fourth and Tenth Circuits. Additionally, the court rejected the AGC’s argument that that *Caltrans* needed to show that every

²³² *Concrete Works I* at 833-834.

²³³ *Caltrans* at 1192.

²³⁴ *Rothe* at 1048.

²³⁵ *Concrete Works III* at 898. See also *Rowe* at 249, *Caltrans* at 1197.

minority-owned business is discriminated against; “[I]t is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.”²³⁶

In *Engineering Contractors*, the Eleventh Circuit considered the sufficiency of the anecdotal evidence submitted, which consisted of interviews with two county employees responsible for the MWBE program, 23 MWBE prime and subcontractors and a survey of black owned construction firms. While the Court found “the picture painted by the anecdotal evidence is not a good one,” the anecdotal evidence could not overcome the deficiencies of the statistical analysis and cannot alone support findings of discrimination sufficient to support the implementation of race and gender-conscious programs. “While such evidence can doubtless show the perception and, on occasion, the existence of discrimination, it needs statistical underpinnings or comparable proof to show that substantial amounts of business were actually lost to minority or female contractors as the result of the discrimination.”²³⁷

The District Court for the Northern District of Georgia, in *Webster v. Fulton County*²³⁸, examined anecdotal evidence presented by Fulton County. In that case, consultants for Fulton County conducted 76 one-on-one interviews, public hearings and a random survey of 183 MWBEs. Like *Engineering Contractors*, the District Court found that while the anecdotal evidence “reflects the honest and concerned beliefs of many in the Atlanta and Fulton County area that they have been or are the victims of discriminatory practices,” anecdotal evidence was “insufficient to offset the weaknesses of Fulton County’s statistical evidence.” Furthermore, much of the anecdotes referred to the firms’ experiences in the private sector, and not with Fulton County.

2.3.7 PRIVATE SECTOR ANALYSIS

The Private Sector Analysis seeks to determine whether there is discriminatory practices or disparity in the private marketplace and whether the public entity is a passive participant in any discrimination found. *Croson* speaks to the importance of the effects of private sector disparities for justifying MWBE programs. In *Croson*, the Court suggested several ways that a public entity might be involved in private sector discrimination:

1. **Discrimination in subcontracting opportunities:** “If the City of Richmond had evidence before it that non-minority contractors were systematically excluding minority business from subcontracting opportunities, it could take action to end the discriminatory exclusion.”²³⁹

²³⁶ *Caltrans* at 1192.

²³⁷ *Engineering Contractors*, at. 925.

²³⁸ 51 F.Supp.2d 1354 (1999).

²³⁹ *Croson* at 729.

2. **Discrimination in the construction industry:** “[I]f the city could show that it had essentially become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.”²⁴⁰
3. **Discrimination in professional trade organizations:** “In such a case, the city would have a compelling interest in preventing tax dollars from assisting those organizations in maintaining a racially segregated construction market.”²⁴¹
4. **Discrimination in the provision of credit or bonding by local suppliers and banks:** “[a]ct to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.”²⁴²

Croson also implied that evidence in employment discrimination or discrimination in subcontracting would also strengthen the argument for an MBE program: “[The city points to no evidence that its prime contractors have been violating the [city race discrimination] ordinance in either their employment or subcontracting practices.”²⁴³

*Webster v. Fulton County*²⁴⁴ suggests, however, that a nexus must exist between private sector discrimination and the public agency. The Eleventh Circuit rejected the consultant’s definition of passive participant as a public entity operating in a marketplace where there is discrimination. Per the court, “[I]t does not show that the County’s spending practices are exacerbating identified discrimination in the private sector. The County may rely upon a showing of discrimination in the private sector if it provides a linkage between private sector discrimination and the County’s contracting policies. *Concrete Works*, 36 F.3d at 1529. No such linkage is provided by the data in the Brimmer-Marshall Study.”²⁴⁵

In *Concrete Works III*, the Tenth Circuit found that Denver could meet its burden by showing marketplace or private sector discrimination and linking its spending practices to the private discrimination. This could be done through:

- 1) Anecdotal evidence of City contractors subject to Denver’s goals who are not using M/WBEs on private sector contracts;

²⁴⁰ *Id.* at 720.

²⁴¹ *Id.*, at 726.

²⁴² *Id.* at 729.

²⁴³ *Id.* at 726, n.3.

²⁴⁴ 51 F.Supp.2d 1354 (1999) United States District Court, N.D. Georgia, Atlanta Division.

²⁴⁵ *Id.* at 1370.

- 2) Evidence of discriminatory barriers to business formation by M/WBEs and fair competition; and,
- 3) Evidence of lending discrimination.²⁴⁶

In *Rowe*, the Fourth Circuit found that the State failed to establish any correlation between public road construction subcontracting and private general construction subcontracting, thereby severely limiting the private data's probative value.²⁴⁷

Standards for demonstrating private sector discrimination must be viewed considering the U.S Supreme Court's ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*²⁴⁸. The U.S. Supreme Court indicated that private developers should be given "leeway to state and explain the valid interest served by their policies" and that disparate impact liability must be sure not to "displace valid governmental and private priorities, rather than solely "remov[ing] . . . artificial, arbitrary, and unnecessary barriers."²⁴⁹

2.3.8 RACE NEUTRAL

As part of narrow tailoring, public entities are required to consider the efficacy of race neutral measures in addressing any disparity or discrimination. The race neutral analysis seeks to determine the ability of existing race neutral efforts in eliminating disparity in the marketplace.

Lower courts have considered what constitutes adequate consideration of race-neutral measures. For example, in *Coral Construction v. King County*, the Ninth Circuit considered race-neutral measures, but found them not to be feasible. The Court stated that, "*Associated General Contractors* requires only that a state exhaust race-neutral measures that the state is authorized to enact, and that it have a reasonable possibility of being effective. Here, the record reveals that King's County considered alternatives, but determined that they were not available as a matter of law...King's County cannot be required to engage in conduct that may be illegal; nor can it be compelled to expend U.S. precious tax dollars on projects where potential for success is marginal at best."²⁵⁰

In *Concrete Works I*, the City had already enacted several race-neutral measures, including

²⁴⁶ *Concrete Works III* at 976-978.

²⁴⁷ *Rowe* at 257.

²⁴⁸ No. 13-1371, 576 U. S. (2015)

²⁴⁹ *Inclusive Communities Project*, slip op., at 22.

²⁵⁰ *Coral Construction v. King County*, 941 F. 2d 910, 923 (1991).

breaking down projects to facilitate small business participation; outreach; a prompt payment ordinance; good faith measures; seminars on procurement procedures; and bond guarantee, contractor mentor and pre-apprenticeship programs. Certain race-neutral measures could not be implemented because of requirements for state bonds, lowest bidder and prevailing wages. The court noted, however, “Strict scrutiny requires only good faith, not exhaustion of all alternatives.”²⁵¹

In *Coalition for Economic Equity*, the Ninth Circuit found that race-neutral alternatives had been sufficiently considered, since San Francisco passed and enforced an ordinance prohibiting City contractors from discriminating against their employees. It noted that, in *Hillsborough County*, the MBE law was adopted when the MBE program failed to remedy the discrimination and the law included “all of the race-neutral measures suggested in *Croson*.”²⁵² In summary, the case law suggests:

- 1) If race-neutral programs and legislation were in place prior to the establishment of a race-conscious program, and yet MWBE participation in public procurement remains low relative to availability, then an inference is created that race-neutral programs were inadequate to relieve the impact of past discrimination.
- 2) All race-neutral programs do not have to be considered.
- 3) Low participation by MWBEs in race-neutral programs is evidence that the race-neutral programs do not provide an adequate remedy for past discrimination.

These standards have been buttressed in cases, such as *Western States v. Washington State Department of Transportation*, *Concrete Works of Colorado v. City and County of Denver*, and *AGC v. Caltrans*.

Important in California, the Ninth Circuit in *Caltrans*, for the purposes of narrowly tailoring, only requires “serious, good faith consideration of workable race-neutral alternatives[.]” *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The court found that Caltrans program has considered an increasing number of race-neutral alternatives, starting at 45 in 2008 and reaching 150 in 2010.”²⁵³

In contrast, in *Engineering Contractors*, the Eleventh Circuit expressed concern that the County had not considered race-neutral alternatives. The types of initiatives that the Court believed that the County was obligated to attempt included:

²⁵¹ *Concrete Works I*, 823 F. Supp. 821 (D Colo 1993).

²⁵² See also *AGC of California v. Coalition*, 950 F. 2d 1401, 1417 (1991).

²⁵³ *Caltrans* at 1199.

- Adjusting its procurement processes and ferreting out instances of discrimination within its own contracting process; Take steps to “inform, educate, discipline, or penalize its own officials and employees responsible for the misconduct;”
- Passage of ordinances outlawing discrimination by local contractors, subcontractors, suppliers, bankers, or insurers; and,
- Serious efforts at management, financial and technical assistance programs and evaluations of their effectiveness.

Per the Court, “The first measure every government ought to undertake to eradicate discrimination is to clean its own house and to ensure that its own operations are run on a strictly race- and ethnicity-neutral basis... Instead of turning to race and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort.”²⁵⁴

2.4 CONCLUSIONS

2.4.1 CROSON STANDARDS

If BART chooses to continue to utilize race and gender-conscious techniques, it will need to meet the U.S. Supreme Court requirements of *Richmond v. Croson*. The U.S. Supreme Court established a two-pronged test: (1) that a governmental entity had to show a compelling governmental interest to utilize race and gender-conscious remedies and (2) that any such remedies must be narrowly tailored. A factual predicate or disparity study is utilized to show if there is a compelling governmental interest. Narrow tailoring is the crucial element in crafting appropriate *Croson* remedies.

Courts, for failure of local jurisdictions to narrowly tailor their remedies, have struck down many race and gender-conscious programs. Once a factual predicate has been established, post-*Croson* case law presents several broad guidelines for crafting recommendations for MBE programs by a public entity, based on the factual predicate findings:

- Race and gender-conscious programs should be instituted only after, or in conjunction with, race and gender-neutral programs.
- Race and gender-conscious programs should not be designed as permanent fixtures in a procurement system without regard to eradicating bias in standard procurement operations or in private sector contracting. Consequently, each race and gender-

²⁵⁴ *Id.* at 929.

conscious program should have a sunset provision, as well as provisions for regular review. Additionally, there is the implication that reform of procurement systems should be undertaken.

- Race and gender-conscious programs should have graduation provisions for the M/WBEs themselves.
- Rigid numerical quotas run a greater risk of being overturned by judicial review than flexible goals.
- Race and gender-conscious goals, if any, should be tied to M/WBE availability and to addressing identified discrimination.
- Race and gender-conscious programs should limit their impact on the rights and operations of third parties.
- Race and gender-conscious programs should be limited in scope to only that group(s) that has suffered from discrimination in the jurisdiction enacting the program.

Croson requirements were extended to federal programs in *Adarand v. Pena*.

2.4.2 NINTH CIRCUIT AND STATE OF CALIFORNIA LAW

A. Federal Programs

Despite holdings in other jurisdictions, the case law in the Ninth Circuit principally governs BART's activity. BART's procurement activity includes both federally funded and non-federally funded activity. On federally funded activity in the Ninth Circuit, *Western States* is the seminal case establishing the following requirements, as summarized in the U.S. DOT *Western States* Q&A:

- The study should ascertain the evidence for discrimination and its effects separately for each of the groups presumed by Part 26 to be disadvantaged. The study should include an assessment of any anecdotal and complaint evidence of discrimination
- Recipients may consider the kinds of evidence that are used in "Step 2" of the Part 26 goal-setting process, such as evidence of barriers in obtaining bonding and financing, disparities in business formation and earnings.
- With respect to statistical evidence, the study should rigorously determine the effects of factors other than discrimination that may account for statistical disparities

between DBE availability and participation. This is likely to require a multivariate/regression analysis.

- The study should quantify the magnitude of any differences between DBE availability and participation, or DBE participation in race-neutral and race-conscious contracts. Recipients should exercise caution in drawing conclusions about the presence of discrimination and its effects based on small differences.
- In calculating availability of DBEs, the study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.
- Recipients should consider, as they plan their studies, evidence-gathering efforts that Federal courts have approved in the past. These include the studies by Minnesota and Nebraska cited in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), cert. denied 124 S. Ct. 2158 (2004) and the Illinois evidence cited in *Northern Contracting, Inc. v. State of Illinois, et al.* 2005 WL 2230195, N.D.Ill., September 08, 2005 (No. 00 C 4515).²⁵⁵

B. Non-Federal Programs

In November 1996, California voters passed Proposition 209, Article 1, §31 of the California Constitution, which amended the state constitution to provide that “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.”²⁵⁶ The law went into effect in 1997. The Ninth Circuit and California State Courts, in considering the constitutionality of Proposition 209 have made the following findings and established the following parameters:

- Proposition 209 has been upheld as constitutional, but it does not outweigh the Equal Protection Clause; the California courts have not issued final opinions on when a case, based on the facts, rises to the level to overcome Proposition 209 and require the implementation of race and gender-conscious remedies to comport with the requirements of the Equal Protection Clause;
- While Proposition 209 applies primarily to non-federal programs, cases involving federal programs where the government *permits* not *requires* race and gender-

²⁵⁵ <http://www.transportation.gov/osdbu/disadvantaged-business-enterprise/western-states-paving-company-case-q-and-a>;

²⁵⁶ California Constitution, Article I, § 31(a)

conscious activity, the tenets of Proposition 209 should be applied to those programmatic initiatives;

- Public entities may continue to monitor and report on minority and women-owned business participation in their contracting activities;
- Public entities may not engage in targeted outreach, but may engage in inclusive outreach;
- Public entities must ensure that non-discrimination programs are not in title only and are not operating as race and gender-conscious programs.

2.4.3 ELEMENTS OF A FACTUAL PREDICATE

While *Croson* did not speak directly to the requirements of the factual predicate, lower courts interpreting *Croson* have suggested the following elements should be included:

- Relevant Market
- Availability
- Utilization
- Disparity with Statistical Significance
- Capacity and Regression
- Anecdotal
- Private Sector Nexus

As BART considers the findings of this disparity study and develops race and gender-conscious and race and gender-neutral programmatic initiatives in response to these findings, BART should ensure that the above legal parameters established by *Richmond v. Croson* and its progeny are fully considered.

CHAPTER 3: PROCUREMENT ANALYSIS

3.1 INTRODUCTION

This procurement analysis will determine if there are any systemic barriers within the San Francisco Bay Area Rapid Transit District's (BART) procurement policies, procedures and processes, based on the business owner's race, ethnicity and/or gender that impact a qualified vendor's access to opportunities at BART. This assessment will assist in determining if there is inherent, unintended, or purposeful discrimination because of the way BART procures goods and services.

M³ Consulting uses a broad analysis that considers both the tenants of the BART Strategic Plan and Mission and the impact of BART's procurement practices on all contracting opportunities. In support of this effort, M³ Consulting carried out a two-pronged analysis and review:

- A review of BART's procurement policies, procedures and practices, including organizational structure analysis and interviews with personnel in various departments; and,
- A review of the impact of BART's procurement structure, policies, procedures and practices on the ability of DBEs, SBEs and MWBEs to do business with BART.

This procurement analysis is organized into the following sections:

3.2 Best Industry Practices Review

3.3 Review of BART's Organizational Structure and Procurement Process

3.4 Review of BART's DBE, SB and Non-Discrimination for Subcontracting in Non-federally Funded Contracts (ND Program)

3.5 Impact of BART's Procurement Process and DBE, SB and ND Programs on SM/W/DBE Participation

3.6 Conclusion

Operational characteristics within the procurement/project delivery structure that hinder the involvement of disadvantaged business enterprises (DBEs), small business enterprises (SBEs), and minority- and women-owned business enterprises (MWBEs) in BART

procurement opportunities may necessitate fundamental changes to the overall procurement and contracting activities at BART to ensure inclusiveness, transparency, accountability and efficiency, as it relates to DBE, SB and MWBE participation and consistent with BART's strategic mission and vision. M³ Consulting may recommend changes in Chapter 12: Conclusions and Recommendations.

3.2 BEST PRACTICES IN PUBLIC SECTOR PROCUREMENT

3.2.1 Inclusive and Sustainable Procurement

Public procurement represents anywhere between 10-45 percent of a nation's GDP [Gross Domestic Product], with the average percentage in developed countries around 15-20 percent. This percentage only represents public sector procurement. When private sector procurement is added to the equation, institutional purchasing accounts for over 30-60 percent of a nation's GDP. That means that our economies are significantly driven by the decisions made by purchasing agents.²⁵⁷

Public sector procurement systems are responsible to the citizens within its jurisdiction. Per Prier, McCue and Bevis,²⁵⁸ the public entity, through its procurement process, is responding to the "Triple Bottom Line – the simultaneous delivery of economic, environmental, and social policies that facilitate an integrated community development strategy."²⁵⁹ Within this focus, the procurement team is also responsible for the procurement of goods and services efficiently and cost-effectively. However, cost-effectiveness should not be achieved to the detriment of certain groups within a public entity's jurisdiction. Per Prier, McCue and Bevis, "continued participation by these targeted groups [small and historically underutilized business] is a necessary precursor to a robust community economic development strategy that leads to prosperity."²⁶⁰

The objective of the procurement operation therefore is one of inclusive and sustainable procurement and economic development (SPED)²⁶¹. The execution and implementation of a

²⁵⁷ "Playing the Game", Sherry J. Williams, Esq., MBE Magazine, July/August 2013.

²⁵⁸ "Making It Happen: Public Procurement's Role in Integrating Economic Development and Sustainability Strategies for Local Governments in the U.S.A.," Eric Prier, Clifford P. McCue and Michael E. Bevis*, 3rd International Public Procurement Conference Proceedings, 28-30 August 2008; *Eric Prier, Ph.D., is an Associate Professor, Department of Political Science, Florida Atlantic University. Clifford P. McCue, Ph.D., is Associate Professor, and Director, Public Procurement Research Center, School of Public Administration, Florida Atlantic University. Michael E. Bevis, CPPO, C.P.M., PMP, is Chief Procurement Officer, City of Naperville, Illinois, USA.*

²⁵⁹ *Ibid.* at 639.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.* at 642.

public entity’s community economic development objectives commences with the procurement process. M³ Consulting asserts that the degree to which the public entity achieves its community economic development objectives through procurement depends on whether the public entity starts with a public policy approach to procurement and community economic development, supported by project execution.

3.2.2 BEST PRACTICES: COMPREHENSIVE PROCUREMENT SYSTEMS

M³ Consulting has reviewed numerous public sector procurement operations and developed an overview of best practices as it relates to creating an inclusive and sustainable procurement environment that promotes the participation of all firms, in a nondiscriminatory manner. A comprehensive procurement system includes the ten components listed below. M³ Consulting measures BART’s procurement environment against these ten features.

| Figure 3.1. Ten Components of a Comprehensive Procurement System | |
|---|--|
| 1. Organizational Structure | Effective Organizational Structure provides for checks and balances and encourages collaboration and broad input from a variety of perspectives. An organizational analysis provides an assessment of the open and competitive nature of the procurement system. To make this determination, M ³ Consulting gauges the degree of centralization or decentralization of the procurement process, the sufficiency and interrelationship of the written policies and procedures, and the transparency of the procurement process. |
| 2. Budgeting and Forecasting | Effective budgeting and forecasting are essential elements in the development of successful procurement programs that enhance bidder participation and utilization of DBEs, SBs and MWBEs. Budgeting and forecasting allow greater and more in-depth planning for inclusion of DBEs, SBs and MWBEs in a public entity’s opportunities at the prime and subcontractor levels. M ³ Consulting reviews the degree to which an agency engages in procurement forecasting and determines how forecasting is utilized to promote inclusion. |
| 3. Informal Procurement | Informal Procurement provides the greatest opportunity for procurement personnel to impact the choice of vendors selected. These purchases are below a certain dollar threshold, and are not subject to a formal contracting process or an advertised competitive bid process. M ³ Consulting reviews the way Buyers or procurement agents utilize their discretion in the identification of those vendors from whom they will solicit quotes and who will be selected to receive the final award. |

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|---|--|
| <p>4. Formal Purchasing</p> | <p>Formal purchases usually allow procurement personnel less discretion in vendor selection, particularly in jurisdictions that must select the lowest bidder. Some discretion, however, typically does exist in formal purchasing, such as when a selection criterion, like the “lowest bidder,” can be modified to include terms such as the “lowest responsive and responsible” bidder. M³ Consulting reviews the formal procurement process to determine how available discretion is exercised.</p> |
| <p>5. Bid Opening and Evaluation</p> | <p>Objective and thorough bid opening and evaluation procedures ensure the fair and fully vetted consideration of bid and proposal submittals. Analysis of these procedures allows M³ Consulting to determine whether there is any subjectivity in the selection of prime contractors.</p> |
| <p>6. Post Award Contract Administration</p> | <p>Effective Contract administration includes comprehensive and consistent management of the contract, payment practices and reviews of contractor performance. A considerable amount of vendor contact occurs at this phase of the procurement process. A review of contract administration procedures allows M³ Consulting to determine overall fairness and consistency as well as how inspectors, engineers and other personnel interact with prime and subcontractors while the contract is being performed.</p> |
| <p>7. Non-Competitive Procurement</p> | <p>In some instances, non-competitive purchases are warranted for very specialized goods or services. However, in an effectual Procurement System, these instances are limited. M³ Consulting reviews sole source, emergency purchases, change orders and contract amendment policies to determine whether this component of the purchasing process is being used appropriately or competitive bidding procedures are being avoided inadvertently or intentionally.</p> |
| <p>8. Bonding and Insurance</p> | <p>Bonding and insurance are contract requirements that protect the interest of the owner. These contract requirements insure that the Owner can complete the project regardless of nonperformance by a contractor and provide protection against site accidents and other mishaps that may occur during construction and/or during provision of services. M³ Consulting reviews rules and regulations regarding bonding and insurance to ensure that they are not overly burdensome to DBEs, SBs and MWBEs.</p> |
| <p>9. Comprehensive and Efficient Enterprise Systems</p> | <p>Enterprise systems are critical to monitoring and tracking organizational performance. Without effective enterprise systems, the public entity cannot effectively monitor and evaluate organization procurement operations and decision-making, particularly in a decentralized procurement environment. M³ Consulting reviews these enterprise systems to ensure that procurement systems capture data to the degree</p> |

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| | necessary to not only track levels of participation, but also to determine areas of disparity real time. |
| 10. Race/Gender-Focused Initiatives | See Figure 3.2 |

Source: M³ Consulting

3.2.3 BEST PRACTICES: DBE OR MWBE PROGRAMS

In addition to the components of a comprehensive procurement system, M³ Consulting has identified six essential program elements of successful and comprehensive DBE or MWBE programs. These program elements should be fully integrated and work in collaboration with the overall procurement system while supporting the tenants of the organization’s Mission and Strategic Plan and its community economic development objectives. *We note that BART does not administer an MWBE program and any references to MWBEs refers to minority and women owned businesses only.*

When these six essential program elements are consistently utilized, these elements tend to increase the opportunity for DBE, SB and MWBE success to participate in business and sustainable community economic development opportunities:

| Figure 3.2. M³ Consulting Six Essential DBE or MWBE Program Elements | |
|--|---|
| 1. Outreach and Matchmaking | Efforts to increase the business community’s awareness of an entity’s procurement and contract opportunities and match DBEs or MWBEs to specific contract opportunities at prime and subcontracting levels. |
| 2. Certification | Eligibility criteria for DBE or MWBE participants. |
| 3. Technical Assistance | Informational and strategic support of businesses to meet the entity’s DBE or MWBE plan objectives. |
| 4. MWBE Inclusion in Bid Opportunities | The mechanism by which the entity assures that material consideration of DBE or MWBE participation is given in the award of a contract in a non-discriminatory manner. |
| 5. Contract Compliance | Ensuring adherence to DBE or MWBE goals and objectives on all contracts after execution of the contract. |

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| 6. Organizational Performance Evaluation | A comparison of performance results to the entity's goals and objectives to determine policy successes, strengths and weaknesses, and performance improvement areas. |
|---|--|

Source: M³ Consulting

3.3 BART'S ORGANIZATIONAL STRUCTURE AND PROCUREMENT PROCESS

Below is the review of the organizational structure, procurement policies, procedures and practices for BART, as well as the laws and regulations of the State of California and the U.S. DOT that apply to BART.

To conduct this analysis, M³ Consulting reviewed the following procurement policies, procedures, laws and regulations:

- 2008 and 2015 BART Strategic Plan
- BART Procurement Manual
- BART Procurement Guidelines, Procedures and Forms
- BART DBE Policy, DBE Core Program, DBE Appendices and FTA Triennial Reviews
- BART Small Business Program
- BART Non-Discrimination for Subcontracting in Non-Federally Funded Contracts
- BART Resource Manuals
- BART Audit Reports
- California Public Contract Code
- 49 CFR Parts 26

In addition to reviewing the organizational structure and written policies and procedures, M³ Consulting conducted 15 interviews with staff in the Office of Civil Rights, Procurement Department, Planning, Development & Construction and Maintenance & Engineering.

These interviews assisted M³ Consulting to determine if actual practices are consistent with written policies and procedures and if written policies are unclear. This review of policies, procedures and practices provides an understanding of procurement operations to determine the impact of those operations on the inclusion of DBEs, SBs and MWBEs. This analysis is not intended to be a procurement audit or personnel performance review. The following analysis reflects the results of the review of BART's procurement policies, procedures and practices as compared to the ten components outlined above.

3.3.1 ORGANIZATIONAL ANALYSIS

A. BART's Strategic Mission and Vision

The California State Legislature created BART in 1957 to operate a heavy rail system in the San Francisco Bay area. BART's service area covers a population of 3.9 million persons in the counties of San Francisco, Alameda, Contra Costa and San Mateo.

BART's Board of Directors, General Manager and Executive Staff have consistently reflected a commitment to inclusion and equity in the Region. In 2008, BART adopted a Strategic Plan with specific Vision, Mission and Goal Areas and Implementing Strategies.²⁶² Part of that plan appeared to embrace the triple bottom line discussed by Prier, McCue and Bevis.²⁶³ The BART Mission Statement within the Strategic Plan states its purpose is to:

Provide safe, clean, reliable and customer-friendly regional public transit service that increases mobility and accessibility, strengthens community and economic prosperity and helps preserve the Bay Area's environment.²⁶⁴

²⁶² BART Strategic Plan, October 2008.

²⁶³ See infra p. 3. "Making It Happen: Public Procurement's Role in Integrating Economic Development and Sustainability Strategies for Local Governments in the U.S.A," Eric Prier, Clifford P. McCue and Michael E. Bevis*, 3rd International Public Procurement Conference Proceedings, 28-30 August 2008; *Eric Prier, Ph.D., is an Associate Professor, Department of Political Science, Florida Atlantic University. Clifford P. McCue, Ph.D., is Associate Professor, and Director, Public Procurement Research Center, School of Public Administration, Florida Atlantic University. Michael E. Bevis, CPPO, C.P.M., PMP, is Chief Procurement Officer, City of Naperville, Illinois, USA.*

²⁶⁴ *Ibid.* at p.1.

Further, the Strategic Plan, Mission and Goal Areas recognize that policies and procedures are admirable guides but people must execute them. It then forthrightly includes “A Mission & Value-Driven Workforce” charged in part under “Accountability” to:

Ensure that employees understand their roles in carrying out the BART mission and are accountable for accomplishing them in a manner consistent with the agency’s values; and Provide recognition and reward for employees who excel.²⁶⁵

In its 2015 Strategic Mission and Values, the Board established that BART’s vision “supports a sustainable and prosperous Bay Area by connecting communities with seamless mobility.” In doing so, BART established the goal of “Leadership and Partnership in the Region” that has three sub-goals:

- **Economy**—Contribute to the region’s global competitiveness and create economic opportunities.
- **Equity**—Provide equitable delivery of transit service, policies, and programs.
- **Environment**—Advance regional sustainability and public health outcomes.

M³ Consulting overlaid the current BART procurement policies, procedures and actual practices on these commitments expressed in BART’s Vision and Mission statements as part of the overall analysis to determine “to what extent procurement policies can be effective strategies in facilitating community economic development”²⁶⁶ -- in part by promoting inclusion of all firms in the Region in BART procurement and contracting opportunities in a non-discriminatory manner.

The Strategic Plan, with the clearly stated Mission and Vision, provides structure to the organization and should lead to a practice which includes, not only workforce diversity, but also integrated planning nodes and collaborative departmental efforts that enhance diversity of vendor/contractor awards and inclusion to reduce and/or eliminate the risk of discrimination.

B. Organizational Structure

BART is governed by a nine-member publicly elected Board of Directors, each representing the voters of one of BART’s electoral districts. BART’s General Manager, General Counsel,

²⁶⁵ *Ibid.*

²⁶⁶ “Making It Happen”, p. 639.

Controller/Treasurer, and District Secretary are board-appointed officers and report directly to the Board of Directors.

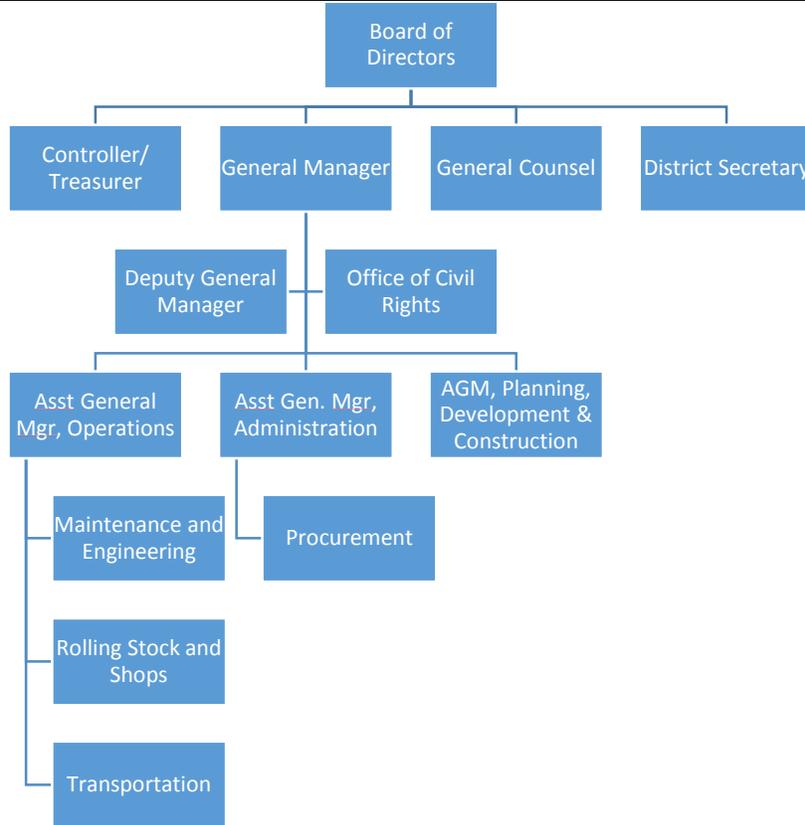
The Procurement Department reports to the Assistant General Manager of Administration and Budget. Out of a total of 89 Procurement Department personnel, there are 6 Buyers, 4 Principal Contract Specialists, 5 Contract Specialists III, 1 Contract Administrator, which are principally responsible for the bidding and procurement of goods and services.

The Office of Civil Rights (OCR) is part of the General Manager's office and reports directly to the Deputy General Manager. OCR consists of 24 staff members, eight of which focus on the monitoring and operation of BART's DBE, SB and Non-Discrimination Programs.

The Office of the General Counsel (OGC) reviews larger value contracts and Agreements prior to advertisement to ensure they comply with applicable Federal, state and District legal requirements and policies including appropriate DBE, SB, or ND program terms. Once any necessary revisions are made to the contract documents, OGC approves them as to form to be released for advertisement.

OGC also provides legal support during the bidding and award process, as well as during contract performance, reviewing and approving change orders when needed, and addressing contract claims and disputes through contract close out.

Figure 3.3. BART Organization Hierarchy Outline



Source: M³ Consulting; All functions are not reflected on table; only those most relevant to purchasing and contracting, and DBE, SBE and ND program operations.

C. Procurement Function

The General Manager is responsible for delegating authority for procurement and this authority may not be delegated solely to the Procurement Department.²⁶⁷ The Procurement Department can delegate to other departments/functions, as it deems necessary and appropriate.²⁶⁸ In BART procurement transactions, Sponsor Departments play a major role in the procurement functions of solicitation, evaluation and selection and have significant responsibility in post-award contract administrative functions. *(See also Competitive Negotiation and Contract Administration discussions under Formal Purchases Section.)* We

²⁶⁷ Procurement Manual, Rev. 9, October 2013, I-4: Delegation of Authority, p. 17, I-6: Contracting Officer, Contract Administrator/Buyer, Project Manager, p. 30.

²⁶⁸ Procurement authority re-delegated by the General Manager to others independently of the Procurement Department’s authority, may not be modified or revoked by the Department Manager of Procurement. Procurement Manual, page 30.

note that, without sufficient oversight, this departmental involvement can lead to departments that focus on their own individual department needs and perceived responsibilities without collaborative input from others, or overall guidance and reminders of the overall mission of BART.

BART has positively attempted to ensure transparency and accountability by requiring multiple levels of approval through the Executive Decision Document²⁶⁹ prior to contract execution and Approval-in-Concept²⁷⁰ prior to commencement of major procurements and including the Procurement Department in a non-voting role on evaluation committees.

The responsibilities of the various departmental units in the purchasing process are outlined in the Procurement Manual and the Procurement Guidelines and are summarized below in Figure 3.4.

²⁶⁹ Document prepared by appropriate District personnel requesting authority to award a contract or agreement over \$100,000 or to execute a supplemental agreement over \$100,000, or to notify Executive Staff and seek approval for various contractual changes, etc., Procurement Manual, Page 9.

²⁷⁰ Major procurements, except those specifically identified by line and approximate cost in an approved operating or capital budget, must be approved in concept by the General Manager. An EDD must be submitted by the Sponsor Department/Project Manager through the management supervisory chain to the General Manager for signature. Procurement Manual, Page 17.

| Figure 3.4. BART Procurement Functions* | |
|---|--|
| General Manager (GM) & Assistant GM Responsibilities | <ul style="list-style-type: none"> • Reviews Professional Service Agreements over \$100,000 prior to submittal to Board for approval .²⁷¹ • Approves final award of contracts under \$100,000.²⁷² |
| Procurement Department Responsibilities | <ul style="list-style-type: none"> • Reviews technical specification for completeness, or Purchasing Division clarity, and accuracy. To the extent possible, ensures that it is non-restrictive and generic. Identifies most appropriate contracting method/type of contract (almost always firm fixed price) • Reviews Purchase Requisition for adherence to established procedure • Develops Invitation for Bids (IFBs) (coordinating with User, General Counsel, Office of Civil Rights, Insurance, and when appropriate, Labor Relations) • For FTA-funded procurements, insurances that IFB contains required clauses and provisions • Compiles Advance Notice to Bidders (Purchase Contracts only) and prepares mailing labels of prospective Bidders excluding names contained on the Debarred, Suspended and Ineligible Contractor list including sources obtained from Office of Civil Rights’ CUCP Director, those identified by requestor and any other known sources • Mails copy of the Invitation For Bid (IFB) Notice directly to names on Bidders List • Distributes IFBs to those requesting copies, carefully recording names and addresses of all holders of IFB • Conducts Pre-Bid Conference and Pre-Bid Site Inspection if required • Receives requests from prospective Bidders for clarification or modification of IFB as well as requests for approved equals. • Coordinates the evaluation of requests from prospective Bidders for modification of terms and conditions and specifications • Informs all prospective Bidders by addendum of any change to IFB. For newly approved “or equals”, notification must be sent to all prospective Bidders |

²⁷¹ This GM responsibility change went into effect October 2015. The review includes outreach plan, matchmaking or other efforts, selection panel characteristics, and procurement process, including selection criteria

²⁷² Procurement Manual, Rev. 9, October 2013, I-4: Delegation of Authority, Exhibit A, p. 22.

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| | <ul style="list-style-type: none"> • Receives Bids and provides for their security. Procurement opens bids below \$100,000 for purchase contracts, below \$10,000 for public works and all bids for services and miscellaneous procurements. • Reviews bids for responsiveness to general terms and conditions of IFB and responsibility for compliance. • Evaluate need for additional price or cost data and secure from Contractor if needed. • Performs price analysis as needed and the User Department/ Project Manager will perform cost analysis if required • Conducts Qualification meeting, as appropriate to determine if Bidder is technically and otherwise qualified to be awarded the contract. • Advises District Secretary to hold bid securities, if appropriate, until the contract has been fully executed, after which all Bidders' securities except any securities which have been forfeited, will be returned to the respective Bidders whose bid they accompanied, but in no event will Bidders' securities be held by the District beyond sixty (60) days from award of the contract. • Coordinates and circulates EDD to obtain authorization to award contract to responsible Bidder submitting the lowest responsive bid. • Sends Purchase Order to Vendor or contract to Contractor • Prepares Notice to Proceed, based upon User Department input. • Executes Notice to Proceed and transmits to Contractor. |
| <p>District Secretary Responsibilities</p> | <ul style="list-style-type: none"> • Advertises procurement as appropriate, in local newspapers, minority media trade journals, national medial, e.g. <u>Passenger Transport</u>. • Conducts public bid opening for purchase contract bids over \$100,000. Receives and conducts public bid opening for public works contracts over \$100,000. Prepares bid-opening form. Distributes low bid (for both operating and capital contracts) to General Counsel and Office of Civil Rights. Provides copy of all bids to Contract Administration/ Purchasing Division. • Forwards bonds and insurance policies to General Counsel and Insurance Department for review and concurrence • Issues notice of award; notice to proceed, substantial completion, and acceptance of contract.; Arranges for contract execution. |
| <p>Sponsor Department Responsibilities</p> | <ul style="list-style-type: none"> • Prepares requisitions, technical specifications and scope of work, identifying specific work elements which do not restrict competition |

| | |
|------------------------------------|--|
| | <ul style="list-style-type: none"> • Prepares and approves Purchase Requisitions and transmits purchase requisition, technical specification, cost estimate, approval-in-concept, and other bid package input to Procurement Department • Obtains authorization to advertise capital projects from Capital Program Control Division • Performs technical evaluation of all requests for approved equals and informs Contract Administration/Purchasing Division of results in writing. Responds to requests for clarification of specifications received from Bidders and forwards information to Contract Administration/Purchasing Division • Reviews bids received for technical responsiveness and notifies Contract Administration/ Purchasing Division in writing of technical finding(s) (final decision may be withheld pending qualification hearing.) • In conjunction with Procurement Department, conducts price analysis and negotiates price • Circulates Executive Decision Document to obtain necessary approvals from Sponsor Department, General Counsel, Insurance, OCR and General Manager. • Performs contract administration • Manages On-Call contracts and selection of CMs and sub consultants under On-Call contracts. |
| <p>OCR Responsibilities</p> | <ul style="list-style-type: none"> • Reviews bids for compliance with DBE, SB or Non-Discrimination for Subcontracting Program, as applicable. • In conjunction primarily with General Manager's Office and Sponsor Department, develops DBE goals, Micro Small Business Enterprise (MSBE) set-aside, or SB bid preference. • In conjunction with Sponsor Department, determines whether specifications/scope of work can be broken into smaller units |
| <p>General Counsel</p> | <ul style="list-style-type: none"> • Legal review draft contracts, Agreements and procurement documents prior to advertisement, review of bid and bid bond, bid protests, subcontractor substitutions, claims, change orders, and disputes |
| <p>Insurance</p> | <ul style="list-style-type: none"> • Reviews bids for compliance with District Requirements (Public Works) |

Source: BART Procurement Manual, Rev. 9, October 2013, I-4: Delegation of Authority, Exhibit A, Rev. 7, May 2010, III-3: Responsibilities for Procedural Steps by Department, Rev. 7, May 2010, III-6: Evaluation of Bids, Rev. 9, October 2013, I-4: Delegation of Authority, I-6: Contracting Officer, Contract Administrator/Buyer, Project Manager.

*Primarily addresses responsibilities for Formal Bids. See also Section 3.3.6 Informal Procurement

The Procurement Department is divided into two functional units:

1. **Buyers**—Buyers are responsible for the purchase of goods and supplies. Sponsor Departments submit requisitions to the Procurement Department, which identifies potential vendors, receives quotes from those potential vendors and determines the low bidder. Based on staff interviews and somewhat contrary to the responsibilities outlined in Table 3.4 above, Buyers often rely on the Sponsor Department to identify potential vendors, but may continue searching for other vendors capable of providing the goods, if they deem it necessary to do so.
2. **Contract Specialists**—Contract Specialists primarily handle formal sealed bids and requests for proposals. Based on staff interviews, Contract Specialists at BART focus more narrowly on the bid process (function and tasks), with little strategic and comprehensive involvement in the overall procurement requirements supporting the project for which services are being procured. However, interviews with senior staff revealed that the Manager and Supervisor of Contract Administration are often substantially involved in strategic planning of procurement requirements.

During interviews, staff in the Procurement Department, Planning, Development and Construction, Maintenance and Engineering and the Office of Civil Rights shared their perceptions on day-to-day functions of BART's procurement, contract administration and project management processes that impacted fair and efficient operations. Staff comments were primarily focused on the narrow focus of the Procurement Department, the decentralized nature of procurement functions and the challenge this presents to the organization's system of checks and balances, acknowledging that "*there are so many moving parts, it's easy for something to fall through the cracks.*" The impact of this decentralized process is exacerbated by the transfer of procurement functions and responsibilities to Sponsoring Departments, particularly post-award. This transfer of responsibility has created a conundrum for BART, in that the organization tries to balance the desire to provide flexibility to Project Managers executing the A&E and construction projects with the need for more defined /less broad scopes to provide more opportunities for diverse firms. "*We've got everything and the kitchen sink in some of these scopes, and that's why then we struggle.*"

The transfer, per interviewees, also leads to greater challenges in ensuring that Sponsor Department Project Managers do not show favoritism toward particular firms, particularly under A&E On-Call contracts, where they have greater involvement in determining which awarded prime and subcontractors will perform specific work plans. As noted in interviews, Construction Managers and Architecture and Engineering teams respond to On-Call A&E contracts by assembling large teams of sub-consultants to be positioned to respond to any

need that BART may have. Interviewees noted that these large teams may lead to sub-consultants who are never utilized by BART, because of a lack of need or better qualified sub-consultants on another team. Once BART selects the group of Construction Managers and Architecture and Engineering teams who will be available to BART under the On-Call A&E contract, Project Managers have the flexibility to select the sub-consultants that they prefer from any team. Recently, Project Managers have been instructed that they must make their request to the prime contractor, to ensure that the subcontract is not a pass-through. One interviewee recognized that Project Managers “are pretty much in tune with each of consultants” as such, they are familiar with the available DBEs. If a DBE (or any other contractor) is utilized early and “after two or three project managers work with them,” the DBE will receive more opportunities.

D. Enterprise Systems Supporting the Procurement and Project Management Functions

While BART has implemented PeopleSoft financial modules, procurement and program management modules have not been implemented. OCR has created its own S/M/W/DBE commitment, payment tracking and monitoring system through the Vendor Payment Tracking System (VPTS). While Planning, Development and Construction (PD&C) and OCR have begun to utilize Elations System on select projects for certified payroll, Elations has an M/W/DBE tracking function that is not utilized by BART. The Warehousing Department utilizes Maximo Asset Management System. Recently, Procurement developed the Procurement Vendor Portal to allow registration of potential vendors and posting of RFPs. Receipt of bid and quote submissions has not yet been computerized or made accessible on-line. Currently, bidder data is maintained in hard copy formats and must be collected manually, even for FTA reporting. In addition to these systems, various departmental staff create Microsoft Excel spreadsheets to support their efforts in managing their various responsibilities.

The multiple systems are not integrated and do not capture all procurement data necessary for the reporting of BART procurement decisions as it relates to DBE, SB and MWBE participation. Reporting of DBE, SB and MWBE participation and determination of disparate impact in real-time is not available. One IT staff member noted that BART is about two years away from being able to easily and reliably produce this information from its ERP (Enterprise Resource Planning) systems, as it relates to DBE participation at the prime and subcontractor levels. One Procurement Manager noted that previous system capabilities to review DBE participation had been discontinued. Other BART staff members noted that the multiple and, often, non-integrated enterprise systems create significant project management inefficiencies on the hundreds of contracts underway at BART and make project management and oversight “*brutally painful*.” The impact of the lack of integration on DBE,

SB and MWBE participation, suggested a staff member, is the inability of staff to see their progress in meeting stated goals and thus a reduced ability to respond to any shortfalls in real-time. *“If we had it say on a dashboard, and a manager knew okay, I’ve got this red, green, yellow. Guess what, my OCR is dipping into the yellow, I better pay attention to that. That would be ideal, from my point of view.*

E. Contract Authority

Below in Figure 3.5 is the Authorization Matrix for Contract Actions and 3.6 is an Authorization to Award Contracts Matrix.

| Figure 3.5. Authorization Matrix—Contract Actions | | |
|--|----------------------------|---|
| Procurement Type | Authorization Limit | Required Approvers |
| Service, letter agreements, and miscellaneous procurement contracts | Below \$5,000 | <ul style="list-style-type: none"> • Department Managers |
| Competitive contracts and modifications for services, miscellaneous procurements and public works | Below \$50,000 | <ul style="list-style-type: none"> • Contract Administration Manager |
| Single bid or single brand name procurements and non-competitive awards | Below \$25,000 | <ul style="list-style-type: none"> • Contract Administration Manager |
| Competitive contracts and modifications for services, miscellaneous procurements | Below \$50,000 | <ul style="list-style-type: none"> • Manager of Purchasing |
| Single bid or single brand name purchases and non-competitive awards | Below \$25,000 | <ul style="list-style-type: none"> • Manager of Purchasing |
| Competitive or non-competitive procurement actions related to Purchase Contracts, Public Work Contracts, Services Agreements, and Miscellaneous Purchase Contracts | Below \$50,000 | <ul style="list-style-type: none"> • Procurement Department Manager |
| | Below \$100,000 | <ul style="list-style-type: none"> • General Manager/ Deputy General Manager |
| | \$100,000 and above | <ul style="list-style-type: none"> • Board of Directors |

| | | |
|---|--|---|
| Modifications/change orders to procurement and construction contracts | Below \$200,000 and not to exceed 10% of original commitment or those that do not constitute substantial alteration of the contract* | • General Manager/ Deputy General Manager |
| | \$200,000 or 10% and above of original commitment amount | • Board of Directors |
| Modifications/change orders to service agreements | Below \$100,000 | • General Manager/ Deputy General Manager |
| | \$100,000 and above | • Board of Directors |

Source: BART Procurement Manual;

* For construction or procurement contracts over \$200M, the General Manager has authority to approve change orders of up to \$500K, per Board Rule 5-2.3.

| Figure 3.6. Authorization to Award Contracts | | | |
|---|---------------------------------|----------------------------|----------------------------------|
| Expense Type | Document | Authorization Limit | Required Approvers |
| Public Work Contracts | EDD | Above \$100,000 | • Board of Directors |
| | Mini-EDD | \$10,000 - \$100,000 | • Procurement Department Manager |
| | Minor Public Work Service Order | \$10,000 or less | • Sponsoring Department Managers |
| Services | EDD | Above \$100,000 | • Board of Directors |
| | MDD | \$50,000 - \$100,000 | • Deputy General Manager |
| | | Up to \$50,000 | • Procurement Department Manager |

Source: BART Procurement Manual

3.3.2 POLICIES AND PROCEDURES

In reviewing the Procurement Department Policies and Procedures to determine their consistency with the attributes of well-written policies, the following observations were made:

| Figure 3.7. Analysis of Policies and Procedures | |
|---|--|
| 1. Clearly defined functions of all personnel involved in procurement decisions | <p>The policies and procedures adequately address the responsibilities and duties of the Manager of Procurement and the staff responsibilities of the Contract Specialists and Buyers, as well as the Office of Civil Rights. The Procurement Manual does clearly establish procurement authority. The Procurement Manual indicates that the General Manager delegates authority of procurement responsibilities.</p> <p>The Procurement Manual does not address the post award relationship between Procurement and Planning, Development and Construction (PDC) and Maintenance and Engineering (M&E) with respect to public works. However, the Resident Engineering Manual thoroughly addresses such relationship.</p> |
| 2. Clear protocol for how & when to utilize various procurement methods | <p>Procurement methods are adequately discussed in the policies and procedures.</p> |
| 3. Clear definitions of procurement terms | <p>There are definitions for procurement terms generally used in the profession such as vendor list, purchase order, tabulation sheet, bidder, proposer, responsible and responsive bidders.</p> |
| 4. Criteria for selection and evaluation of bidders by the major categories of procurement | <p>Criteria for selection and evaluation of purchasing methods are outlined in detail in the Procurement Manual. The Procurement Manual does not include an outline of the process for how DBE, SB or MWBE participation will be factored into the Invitation for Bid (IFB) or Request for Proposal (RFP) process. It does not include the formula utilized to determine the SB and DBE goals to be included in an IFB or RFP. We note that, based on the outcome of previous disparity study, no goals are set on services (RFPs) or procurements (IFBs).</p> |
| 5. Criteria for evaluation of vendor/contractor performance after contract award | <p>Responsibilities of BART's Project Manager for oversight of vendor performance are outlined in the Procurement Manual. However, criteria for vendor performance evaluation post award are not outlined.</p> |
| 6. Clear delineation of the sources of procurement definitions, particularly if municipal, state or federal codes are involved | <p>Delineation of the sources of procurement definitions is outlined in the Procurement Manual.</p> |

Source: M³ Consulting

3.3.3 BUDGETING AND FORECASTING

There are two primary areas of focus under budgeting and forecasting within BART, as it relates to procurement: Capital Budgeting and Procurement Budgeting.

A. Capital Budget, Forecasting and Matchmaking

BART has a capital budget, handled by the Capital Development Department under the Assistant General Manager for Administration and Budget. The Capital Program Control Division of the Office of the AGM must approve all purchase requisitions for capital-funded procurements, including FTA-funded procurements, for Administration and Budget, prior to submission to the Procurement Department.

Based on interviews, OCR and/or Planning, Development and Construction may hold a session to interested vendors about planned and upcoming capital projects. DBEs are invited to these sessions. However, matchmaking sessions are not held at this juncture.

In response to community concerns regarding the lack of accessibility to BART contracts because of their large size, the District has undertaken a Contracting Plan process. The Sponsor Department is responsible for initiating this process and for reviewing upcoming projects prior to commencement of procurement activity to determine whether the opportunity can be unbundled or broken down into smaller units of activity that can be bid separately. Based on interviews, the Contracting Plan is utilized for DBE, SB or MWBE outreach and matchmaking and DBE and SBE goal setting.

B. Procurement Department Budgeting, Forecasting and Matchmaking

As to official procurement forecasting, individual Sponsor Departments determine their procurement needs for the upcoming year. This procurement forecasting does not appear to be an official component of the annual budgeting process. Based on interviews with procurement staff, the Procurement Department is not actively engaged with Sponsor Departments in developing procurement forecast and does not create an overall procurement forecast for the upcoming year based on Sponsor Department estimates of procurement need. However, the Procurement Manual states that Sponsor Departments are expected to plan for “new and renewed procurements 12 to 18 months ahead” and that Purchase Requisitions (P/Rs) should be submitted to the Procurement Department no less than six (6) months before the anticipated contract or purchase order award date_and nine (9) months would be advisable.”²⁷³

²⁷³ Procurement Manual, p.66.

Major procurements are identified in the annual BART Resource Manual. Additionally, according to the Procurement Manual, advanced procurement planning and market research on individual projects is strongly encouraged, with written plans required on procurements of \$1 million or more.

The Procurement Department projects procurement activity for about 3 to 6 months in advance, based on information provided by users (Sponsor Departments), per interviews with Procurement staff. These forecasts are mainly communicated through notification of upcoming bids, which are posted to the BART website. OCR performs general outreach and matchmaking based on these forecasts of activity. As to actual practice as discussed during interviews, the level of outreach engaged in by Procurement staff is based on the habits and approaches of the individual Buyer or Contract Specialist responsible for particular procurements. Most matchmaking at BART is conducted around pre-bid meetings. After the pre-bid session, DBEs, SBs and MWBEs are given the opportunity to network with prime contractors attending the pre-bid session.

Staff suggested that outreach and matchmaking has not always been effective for BART, in increasing the pool of available DBEs, SBs and MWBEs. Outreach is seen as the primary responsibility of OCR by many staff members interviewed. However, some Procurement Department personnel have engaged in outreach, by attending vendor fairs and matchmaking sessions. One interviewee stated that he engages in outreach because minorities often *“get discouraged rather easily with the system, with the municipality such as BART or any other agency - city, state agency - and they feel there's a lot of rules... I always urge them to attend our pre-bid meetings or pre-proposal conferences even if they're a small business. I say, "There may be something in that RFP or contract that we need your help with.”*

3.3.4 VENDOR REGISTRATION

BART implemented a formal Vendor Portal Registration module through its new on-line Procurement Portal. BART is now able to register new vendors. Vendors will have the ability to download active solicitations, receive email notifications and access updates on upcoming solicitations. Currently, only RFPs are available on-line. The Procurement Department maintained a “mailing list.” Individual Buyers or Contract Specialists, OCR, as well as Sponsor Departments, also maintained their own interested parties lists. The individual interested parties’ lists were augmented, as vendors contacted a particular Buyer or Contract Specialist; as Buyers and Contract Specialists conducted online searches for vendors; and as Sponsor Departments provided vendor names to Buyers and Contract Specialists. Prior to the implementation in January 2016 of the online Procurement Portal, the Contracts Manager and some Contract Specialists had tried to combine these lists into a “Mailing List” that was utilized to notify interested vendors of upcoming BART opportunities.²⁷⁴

Contract Specialists send out advance notices to Bidders/Proposers’ on its Mailing List and forward the same advance Notices to OCR to send out to DBEs, SBs and MWBEs in their database. Based on interviews, Contracts Specialists and Buyers do not query this list to determine available vendors, including available DBEs, SBs and MWBEs, on particular contract opportunities.²⁷⁵ Practices of the Procurement Department may change, as it begins to rely more on the new Procurement Portal.

3.3.5 NOTIFICATION AND SOLICITATION

The notification process commences once a requisition is received from a Sponsor Department. BART’s solicitation occurs using the following methods:

- The Office of the District Secretary is required to advertise competitive bids at least once in a newspaper of general circulation no less than 10 days before the bid opening date, and in actual practice, advertises in several newspapers;
- The Procurement Department posts the upcoming solicitations on BART’s Procurement Portal;

²⁷⁴ Based on M³ Consulting’s previous experience, Public Sector Vendors List for an agency such as BART typically can consist of anywhere between 3,000 to 10,000 vendors. BART’s list of vendors in the “Mailing List” consists of a little over 2,000 vendors. We note that larger vendor lists can often reflect lists that have not been purged of vendors who have not actually bid on any projects with the public entity within a specific period of time or who have not requested to remain on the vendor list, in response to the public entity’s inquiry, after a period of time.

²⁷⁵ Under Proposition 209, governmental entities are allowed inclusive race and gender neutral outreach, but not targeted outreach to firms based on their race or gender.

- OCR provides notice to several ethnically focused newspapers, including, but not limited to the Sun Reporter, Philippine News, California Voice, El Mundo Spanish Weekly, The Post, Tsing Tao Daily; and,
- Contract Specialists, Buyers and Sponsor Departments send emails to vendors on their interested parties list.

Small dollar contract opportunities are not advertised or posted to the BART website. A Contract Specialist, Buyer or Sponsor Department notifies vendors of these opportunities through direct contact. During interviews, it was stated that Buyers identify potential vendors, “many times, it’s just through experience—firms that they’ve dealt with many times.” Small firms would know of these opportunities, “only if we’re talking with them or if we know the minorities, we had them on our list.” Procurement personnel and Sponsor Departments are only required to solicit quotes from three vendors on small dollar contract opportunities causing the pool of vendors provided notice of the opportunity to be limited. Under direction from the General Manager, such contracts should go to Small Business (SBs) on the California State Department of General Services (DGS) database of small businesses before soliciting Non-SB firms for such contracts.

3.3.6 INFORMAL PROCUREMENT (NOT REQUIRING ADVERTISEMENT)

Informal Procurement not requiring advertisement are purchases valued at \$100,000 or less for services and procurement, and \$10,000 or less for construction. The procurement method varies based on the threshold value of the purchase. Figure 3.8 summarizes the contract thresholds.

**Figure 3.8.
Informal Procurement or Small Purchases**

| Contract Amount | Solicitation Method Options | # of Quotes Required | Advertisement or Web Ad Required (Yes/No) | Purchasing Responsibility |
|--|--|----------------------|---|---------------------------|
| Under \$2,500 Micro Purchases | Go-Card, Telephone, Letter, Fax, Email | 1 | No | Procurement Department |
| Under \$2,000 Micro Purchases Construction | Go-Card, Telephone, Letter, Fax, Email | 1 | No | Procurement Department |
| \$2,500--\$100,000 Small Purchases | Telephone, Letter, Fax, Email | 3 | No | Procurement Department |
| \$2,000--\$10,000 Small Purchases Construction | Telephone, Letter, Fax, Email | 3 | No | Procurement Department |

Source: BART Procurement Manual, Chapter 5; M³ Consulting

3.3.7 MICRO PURCHASES

Micro Purchases are purchases for \$2,500 or less on goods and services and \$2,000 or less for construction. The Procurement Manager can re-delegate authority for these purchases to Sponsor Departments. The Sponsor Departments are responsible for meeting any established DBE or SB targets and working with the Procurement Department and OCR to encourage DBE and SB participation in Micro Purchases.²⁷⁶ As discussed earlier, the General Manager has directed that such contracts should go to Small Business (SBs) on the California State Department of General Services (DGS) database of small businesses before soliciting Non-SB firms for such contracts.

These purchases are principally procured using the Go Card, or BART’s purchase card, for which the Procurement Department is responsible for monitoring. Micro purchases do not require competitive quotes to be secured. Purchases are not to be disaggregated to meet micro purchase thresholds and avoid competition.

²⁷⁶ Procurement Manual, Rev 7, May 2010, V-2: Small Purchases Under the Micro-Purchase Threshold (Currently \$2,500), p. 198.

3.3.8 SMALL PURCHASES

Small Purchase thresholds are up to \$10,000 for Public Works contracts and \$100,000 for services and supplies. A minimum of three quotes, written or oral, are required for these purchases. Two of the three quotes, when practicable, should be secured from vendors not previously solicited. After requesting quotes, Buyers may award based on receipt of one quote, if only one vendor is reasonably available within the timeframe, i.e. an emergency. Small purchases are not advertised on BART's website. Currently, there is no on-line portal for accepting quotes on small purchases. Buyers' and Contract Specialists' actual practice is typically to identify and secure potential vendors from the Sponsor Department, on-line searches and previous awardees.

Formal evaluations or review of quotes are not required and Buyers can purchase based on price alone. In fact, Buyers and Contract Specialists are required to purchase from a responsible bidder with the lowest responsive bid. Per the Procurement Manual, "award may NOT be made for these items using non-price factors."²⁷⁷ If the Buyer or Contract Specialist awards to a vendor other than the low bidder, a justification must be noted to the file. No notification is provided to the losing bidders.

3.3.9 FORMAL PURCHASING

Formal purchasing or competitive purchasing is required for purchase contracts over \$100,000 and public works contracts over \$10,000. Formal purchasing at BART is done using Invitations for Bid, Competitive Sealed Bids and Requests for Proposals.

Sponsor Departments may request to utilize the "Best Value" Source Selection method, but the General Manager must approve this method prior to commencement of the procurement process. Four criteria are utilized to determine whether Best Value can be utilized:

1. Nature/description of scope of services;
2. Rationale for the desire to utilize the Best Value approach over other procurement methods;
3. Evaluation criteria which would be considered as part of a best value trade-off; and,
4. Range of prices within which the best value trade-offs would be applied.

If the General Manager concurs, notice will be provided to the Procurement Manager.

²⁷⁷ Procurement Manual, Chapter 5, Section 3. 1.

A. Invitations For Bid (IFB)

1. Bid Preparation and Solicitation

The steps to prepare a bid for letting are outlined below:

1. **Approval-in-Concept:** The Sponsor Department must obtain an Approval-in-Concept from the General Manager for a major procurement that is not a pre-approved project.
2. **Specifications:** For approved public works projects, a project summary, cost estimate and technical specifications are prepared by the Sponsor Department's Project Manager from Maintenance and Engineering or Planning, Development and Construction and submitted to the Procurement Department for inclusion in the IFB. A copy will also be sent to OCR. The Contracting Plan and DBE/SBE goal setting also occurs at this juncture. For service agreements and miscellaneous purchase contracts, the Sponsor Department will send similar information to the Procurement Department and on projects over \$50,000 to OCR.
3. **Other elements:** Other requirements, such as time of bid and bonding and/or insurance requirements, are outlined in the Procurement Manual, p. 105-106, III-3, IFB Preparation. Based on interviews with Procurement staff, the Procurement Department has 38 different boilerplate templates from which they select based on the type and circumstances of a particular bid.

As discussed above under Section **3.3.5 Notification and Solicitation**, IFBs are advertised at least once in a newspaper of general circulation for at least 10 days prior to bid opening. This advertisement is the only notice required by California statute. OCR augments this advertisement by providing notice to several ethnically focused newspapers. The Procurement Manual encourages the mailing or notification of IFBs to as many potential vendors as possible. Often, the Contract Specialist will secure a list of potential vendors from the Sponsor Department and supplement with their own lists, as they deem necessary. The Procurement Manual states the Contract Specialist should reach out to OCR to identify potential DBEs, SBs and MWBEs (see Figure 3.4 BART Procurement Function, page 3-12), however, this practice is not always followed, based on interviews.

For Public Works Contract Bids over \$10,000 and IFBs and Procurement Contracts over \$100,000 are opened and read aloud by the District Secretary. A bid summary sheet is prepared at the time of bid opening, consisting of the solicitation number, bid opening date, general description of the procurement item, names of Bidders and bid prices.

2. Evaluation

BART awards contracts to the lowest responsive and responsible bidder. Each is evaluated by a distinct set of requirements and a different group of people.

Responsiveness

Bidder responsiveness is determined by the Procurement Department. Responsive bids are those that conform to “the technical, legal and commercial requirements of the bid documents.” Non-responsive bids are those that deviate from any material factor, including price, delivery, quality or quantity.

DBE or SB goal participation or MWBE availability percentage attainment is a matter of bid responsiveness, which is evaluated by OCR and the Office of the General Counsel, as appropriate.

Responsibility

The Contract Specialist in the Procurement Department determines bidder responsibility. A responsibility determination can be based upon “a bidder’s financial resources, judgment, skill, experience, moral worth, integrity, and ability to fulfill successfully the requirements of the contract.” BART relies on:

1. Status as a manufacturer, service provider or construction Contractor;
2. Financial situation (as appropriate, use Dun & Bradstreet Report, District form "Statement of Qualification and Financial Condition of Bidder");
3. Skill, fitness, capacity and experience;
4. Prior conduct and performance.²⁷⁸

In terms of evaluating responsibility and responsiveness, the Procurement Manual states that:

- The Contract Specialist/Buyer may conduct a non-mandatory Qualifications Review with the apparent low bidder to determine responsibility. The bidder, Sponsor Department Project Manager, General Counsel and OCR can be involved in this session. The Contract Specialist/Buyer is responsible for developing a written responsibility determination memorandum.
- As part of the stated Evaluation Committee responsibilities, the Sponsor Department is responsible for developing a technical evaluation memorandum, and preparing a

²⁷⁸ Procurement Manual, Rev. 7, May 2010, III-3: Evaluation of Bids, p. 116.

memorandum that the apparent low bidder is both technically responsive and responsible. The Sponsor is responsible for developing the technical evaluation criteria and the Contract Specialist prepares the Responsibility Determination Memorandum.

3. Price Analysis

Sponsor Department's Project Manager, with support from the Contract Specialist, conducts price negotiations when necessary to determine that the price is fair and reasonable.

4. Award

For Public Works Contracts, the award of the contract must be made to the lowest responsive and responsible bidder within specified period of acceptance of the bid and after all appropriate executive and Board approvals have been obtained.²⁷⁹ The Sponsor Departments complete the Executive Decision Document (EDD), requesting approval to award the contract or purchase order and circulates to impacted departments. The EDD is then forwarded to the individual responsible for approving a procurement transaction at the stated threshold. The EDD is then forwarded to the General Manager for approval and submission to the Board.

On public works contracts, the Office of the District Secretary notifies the awardee and requires execution of the contract within 10 days of notice of award along with the submittal of required bonding and insurance. In the case of other contracts, a purchase order is sent to the awardee and the District forms a binding contract upon execution.

5. Two-Step Bidding Process

In addition to the Invitation for Bid, BART also utilizes the Two-Step Bidding Process in particularly complex bids with technical proposals. The two-step process can be utilized in place of competitive negotiations when:

1. Available specifications are not definite or complete and mutual understanding of the requirements are needed;
2. Definite criteria exist for evaluating technical proposals;
3. More than one qualified source is available;
4. Sufficient time is available to conduct two-step process; and,
5. A firm-fixed-price will be used.

²⁷⁹ Ibid. See also Procurement Manual, Rev 7, May 2010, III-7: Award Process, p. 122.

The two steps are:

- **Step One** — Requests the submission of both the technical and price proposals in two separately sealed envelopes. In the first step, only the technical proposal is reviewed with the objective of determining the acceptability of the products, equipment or services. While conformity to the technical proposal is determined during this step, this does not equate to a responsibility determination. Responsibility determinations will be conducted consistent with the requirements of competitive negotiations for non-architectural/engineering procurements.
- **Step Two** — Sealed price bids are opened for only those firms or individuals that have submitted acceptable technical proposals.

Technical proposals will be evaluated and categorized as:

- Acceptable;
- “Reasonably susceptible of being made acceptable”; or,
- Unacceptable.²⁸⁰

BART can utilize either a one- or two-step method in selecting a winning bidder. BART does not pre-qualify bidders and the two-step method is not a pre-qualification method.

Prior to utilizing the two-step process, a Source Selection Plan is to be prepared consisting of

- District requirements
- Acquisition background
- Prospective sources for these services
- Competition
- Procurement methods
- Type and Form of contract
- Compensation basis
- Source selection procedures
- Evaluation matrix

²⁸⁰ Procurement Manual, Rev 7, May 2010, III-10: Two Step Sealed Bidding, p. 129.

- Cost estimate
- Selection committee
- Final ranking and recommendation for award.²⁸¹

6. Design Build

The Design-Build procurement method addresses design and construction simultaneously, with the award to a single contractor (consortium, joint venture, team or partnership) responsible for both design and construction. Design-Build is allowed on federally-funded contracts under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), 49 U.S.C. Section 5325(d)(2) and on non-federally-funded contracts under California Public Contract Code Section 22160.

The cost of construction and design must be calculated separately for federally-funded contracts. If construction costs are predominant, BART is expected to utilize competitive negotiations or sealed bids for the entire procurement, and not the Brooks Act procurement procedures, which are qualifications-based. If design costs are predominant, then qualifications-based Brooks Act procurement procedures must be utilized.

²⁸¹ Ibid, at p. 127.

3.3.10 COMPETITIVELY NEGOTIATED CONTRACTS (COMPARATIVE RFPs)

Competitively negotiated contracts (in this discussion, Request for Proposals or RFPs) are utilized when the scope or quantity of services cannot be fully detailed. BART utilizes RFPs to secure the following services:

- Professional services contracts for Architectural and Engineering Services;
- Services contracts for Non-Architectural and Engineering Services; and,
- The purchase of certain electronic and specialized rail transit equipment.

RFPs provide more discretion than sealed bids, as more information is considered in the selection process than primarily price. Using this method, BART may select the vendor whose proposal is most advantageous to BART, considering all factors.

A. Architectural and Engineering Services

These services include architectural, landscape architectural, engineering, environmental, construction management, feasibility studies, environmental studies, preliminary engineering, design, survey, and mapping. A qualifications-based procurement process is utilized. We note, like most public agencies, that most construction-related activity by BART's sub-consultants are deemed professional service, because they are under the rubric of construction management.

In selecting a vendor:

- Price will be excluded as a factor;
- Qualifications will be assessed;
- Negotiations will occur only with the most qualified offeror;
- Failure to reach agreement on price leads to negotiations with next most qualified offeror until the most qualified offeror with a reasonable and fair price is selected.

1. Preparation of RFP

The Sponsor Department's Project Manager will prepare a Request for Consultant Services which includes pertinent details, a project summary and scope of work to include in the Request for Proposal and Contract, along with a cost estimate and staffing table.²⁸² A copy of the Request for Consultant Services is to be sent to the Office of Civil Rights. Once the

²⁸² IV-1, Personal Services Contracts for Architectural/Engineering Services, p. 143.

Procurement Department receives the Request for Consultant Services, it will put together the RFP, obtaining input from The Sponsor Department, Risk and Insurance Department, Office of the General Counsel and the Office of Civil Rights.²⁸³ Proposal should be sent to “a number of qualified sources necessary to promote full and open competition...”²⁸⁴

The Evaluation Criteria utilized on RFPs may include:

- Professional qualifications;
- Specialized experience and technical competence;
- Capacity to accomplish the work in the required time;
- Past performance; and,
- Location in the general geographical area and knowledge of the locality.

The Sponsor Department’s Project Manager, along with Contract Administration, will determine the evaluation criteria and the weights to be assigned to the criteria. DBE participation is determined as a matter of bidder responsiveness.²⁸⁵ Proposers are ranked based on written and oral presentations.

The evaluation factors and sub-factors will be included in a Source Selection Plan.²⁸⁶ The Source Selection Plan, which will be prepared prior to publicizing the RFP is to include:

- District requirements
- Acquisition background
- Prospective sources for these services
- Competition
- Procurement methods
- Type and Form of contract
- Compensation basis
- Source selection procedures

²⁸³ Ibid, at p. 144.

²⁸⁴ Ibid.

²⁸⁵ As a result of the previous disparity study findings, no goals are established for professional services, other services or procurement contracts.

²⁸⁶ Ibid, at p. 146.

- Scoring matrix
- Cost estimate
- Selection committee
- Final ranking and recommendation for award.

The SSP will be submitted to the Sponsor Department Executive Manager and Procurement Manager for approval before the release of the RFP.²⁸⁷

A&E projects over \$50,000 are advertised once in a San Francisco newspaper and/or once in weekly engineering publications.

2. Evaluation Committee for Services Agreements

The Contract Administrator, who votes in the event of a tie, chairs the evaluation committee. The evaluation committee will have at least five persons, with four from the Sponsor Department and one from OCR. The Evaluation Committee generally may include up to 5 individuals chosen from various Departments across the District.²⁸⁸ The Sponsoring Department nominates the evaluation committee members that will be on the evaluation committee and establishes criteria.

3. Selection Process

The Evaluation Committee will review the consultant's technical proposals, as well as oral presentations, if applicable. The Source Selection Plan approved by Procurement concerning interviews, ratings, voting, etc. will govern the review. Oral presentations will be conducted with at least three of the most highly qualified firms. Fees will not be considered at this juncture.²⁸⁹

The Evaluation Committee's scores determine the awardee. While all Evaluation Committee members vote, interviewees appear to suggest that the Sponsor Department has significant influence on the outcome. However, one interviewee provided an example, which illustrated the importance of the involvement of Procurement staff in the evaluations. In one instance, there were a good group of Proposers. An African American-owned firm that had experience with BART submitted a proposal that was not as good as those proposals, where the firms "got more money to put in to make it shine" and was to be eliminated from the shortlist. However, the Contract Specialist intervened and pointed out that, "...it may not be the best

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid., at p. 148.

physically produced proposal, but they've really shown that they can meet BART's standards," which allowed the firm to make the Shortlist and be interviewed.

The Contract Administrator submits the selection committee's evaluations and recommendation in the form of a Source Selection Recommendation to the Procurement Manager who may request additional documentation.²⁹⁰

The Project Manager, with the support of the Contract Administrator, negotiates contract terms and price. Other staff members may be part of the negotiating team as needed. The Contract Administrator will notify all firms of the award decision. The Project Manager will develop the EDD for the General Manager or the Board.²⁹¹

After execution of the contract, the Contract Administrator issues a notice to proceed. At this juncture, the contract becomes the responsibility of the Project Manager. The Project Manager is required to conduct quarterly reviews of the Consultant's Performance.²⁹²

B. Non-Architectural or Revenue Contracts (i.e. Advertising Space) Projects

The procurement process is like that outlined above, except from a few distinctions. Revenue contract is one whose primary purpose is either "producing revenues in connection with an activity related to public transportation, or creating business opportunities with the use of District property."²⁹³ In most cases, the lowest price, cost or the highest revenue is the deciding factor in most selections. However, BART may choose the firm offering the greatest value in terms of performance. "This may be the case, for example, in the acquisition of technical or professional services of a non-architectural-engineering nature, or when cost-reimbursement contracting is anticipated."²⁹⁴ Under cost-reimbursement contracts, cost should not be controlling, as looking for lowest cost in these situations "may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns."

When conducting proposal evaluation, price will be considered, even though "it is not normally the determining factor unless after negotiation and receipt of best and final offers, two or more proposals are equal with respect to all other factors."²⁹⁵

²⁹⁰ Ibid, at p. 149.

²⁹¹ Ibid, at p. 150-151.

²⁹² Ibid, at p. 152.

²⁹³ Ibid, at p. 153.

²⁹⁴ Ibid, at p. 154.

²⁹⁵ Ibid, at p. 157.

3.3.11 NON-COMPETITIVE PROCUREMENT

Non-competitive purchases are those purchases that do not have to be competitively bid. There are seven exceptions to competitive procurement, which are:

1. Lower price on the open market;
2. Public calamity;
3. Emergencies;
4. Prototype equipment;
5. Sole source;
6. Purchase of electronic equipment and specialized rail transit equipment; and,
7. Construction contracts under \$10,000 and purchases under \$100,000.²⁹⁶

M³ Consulting focused primarily on reviewing BART's utilization of emergency and sole source contracts, as these areas reflect opportunities where, sometimes within public sector agencies, there is an unnecessary avoidance of the competitive bid process. Based on interviews, emergency and sole source contracts do not appear to be over utilized within the BART procurement environment.

3.3.12 BONDING AND INSURANCE

BART requires bonding for prime contractors, insurance and liquidated damages clauses in many of its contracts. Below are the requirements as outlined in BART's Procurement Manual.

A. Bonding, Bid Sureties and Liquidated Damages

BART can require four types of sureties:

- **Bid Security:** This can be in the form of a bid bond, cash or certified check, which assures that the Bidder will, upon acceptance of the bid, execute required contractual documents within the specified period. Bid securities are required on all competitively bid construction contracts and purchase contracts more than \$100,000. Although, the

²⁹⁶ Procurement Manual, Rev 6, August 2008, VI-2: Exceptions to Competitive Bidding Requirements Under the California Public Contract Code, p. 223.

Contract Specialist/Buyer, in conjunction with the Manager of Insurance, can determine whether to, on a “case-by-case” basis, require a bid security. If required, the bid security is normally 10 percent of the bid price. It may also be a fixed dollar value.

- **Performance Bonds:** These bonds are to secure fulfillment of the Contractor’s obligations under a construction contract. Performance bonds are also required on purchase orders for commodities when deemed appropriate.
- **Payment Bonds:** Payment bonds, also called labor and material bonds, assure that all persons supplying labor and materials on a construction contract will be paid. All public works contracts have both payment and performance bonds that represent 100 percent of the contract price. Payment bonds for 100 percent of the contract value are required on public works contracts over \$25,000.
- **Liquidated Damages:** This sum represents the amount that the bidder agrees to pay for estimated actual damages if it breaches the contract and fails to complete the contract by the contract completion date. Damages should be reasonable to compensate BART, but not so large as to be construed as a penalty.

Other types of bonds that can be utilized include:

- **Stop Payment Notice Bonds:** Under California Civil Code, a subcontractor or supplier may invoke the stop payments notice procedures until their claim of non-payment by the general contractor has been resolved. The general contractor may post a stop notice bond in response for release of the funds until the claim is resolved.
- **Substitution of Securities for Retention:** A contractor may submit bonds or letters of credit as a substitute for BART retaining monies from its payment. The contractor can also propose an escrow agreement in lieu of retainage.

M³ Consulting inquired during interviews about BART’s ability to waive bonds. Based on the BART DBE Core Program, “[t]he District, in its discretion and on a contract-by-contract basis, may require a prime contractor to eliminate bonding requirements for subcontracts under a certain size or which meet specific criteria. Invocation of this provision shall be determined in consultation with the Office of Civil Rights.”²⁹⁷ In the past, BART could guarantee up to 40 percent of a bond amount or \$750,000, whichever was less. However, during the course of this study, this program has been discontinued due to non-participation of small firms, thus eliminating any support from BART to small businesses on qualifying and meeting BART’s and State of California bonding requirements.

²⁹⁷ BART DBE Core Program, p. 19.

B. Insurance

The Insurance Manager and/or Insurance Coordinator determines the types and limits of insurance required on a BART contract. BART, in limited cases, can permit a contractor to substitute an approved program of self-insurance. Contracts must provide workers' compensation and disability coverage as required by State statutes.

In the boilerplate contract language, the Procurement Department specifies that BART may request commercial general liability insurance, workers compensation insurance (\$1 million per accident) and automobile insurance (\$1 million per occurrence for owned, non-owned and hired vehicles). BART, including securing procurement and payment of premium, provides Professional Liability Insurance. BART also includes a flow down clause, which states that, if any services are subcontracted, the consultant can require insurance at "its discretion." Based on comments from one interviewee, BART strongly encourages the consultant to "work with its sub-consultants on a case-by-case basis to assure appropriate insurance coverage based on the scope of services to be provided and high insurance limits are not unnecessarily passed down."

C. Time of Submittal for Bonds and Insurance Policies

Performance and payment bonds as well as insurance policies must be submitted to the Contract Specialist and reviewed and approved by the Office of the General Counsel and Manager of Insurance for conformity before a Notice to Award can be issued.

Procurement staff, during interviews, acknowledged the challenges to DBEs, SBs and MWBEs that could be created by Bond and Insurance requirements. The Procurement Department found that the original Cost Reimbursement Agreement was somewhat complex and intimidating to small and even mid-sized firms. BART looked at how it could modify the cost reimbursement agreement to make it easier for smaller firms. Some of the insurance language was changed because there were high levels required across the board. This was changed to reflect the individual contracts to make it easier for small firms to comply. BART also included flow-down requirements in its efforts to make certain small businesses are not overburdened by bond and insurance requirements.

3.3.13 CONTRACT ADMINISTRATION

A. Project Manager Responsibilities

Once the contract is executed, the Sponsor Department’s Project Manager becomes responsible for the contract and oversight of execution of the scope of work and contractor performance. Outlined in Figure 3.9 below are the post-award responsibilities of the Project Manager and the Procurement Department’s Contract Administration. In Figure 3.10, the responsibilities of the Resident Engineer are outlined as well. The BART Project Manager delegates day-to-day responsibilities to the Resident Engineers. Resident Engineers are usually contractors employed by Program or Construction Management firms, not BART employees.

| | |
|---|---|
| <p>Figure 3.9. Post Award Responsibilities of Sponsor Department’s Project Manager and Procurement Department’s Contract Administrator</p> | |
| <p>Project Manager Responsibilities</p> | <p><u>Project Progress</u></p> <ul style="list-style-type: none"> • Provide technical direction to the Contractor/Consultant/Vendor • Review progress of work on a periodic basis • Oversee any required product testing and inspection • Review invoices for accuracy and conformance to scope of work, milestones and deliverables • Maintain compliance with FTA requirements <p><u>Change Orders</u></p> <ul style="list-style-type: none"> • Negotiate change (work and price) with Contractor • Perform cost analysis as appropriate • For Public Works, obtain Contractor’s and appropriate BART staff signatures on Change Orders <p><u>Work Directives/Task Orders</u></p> <ul style="list-style-type: none"> • Prepares work directive or task order and circulates for concurrence • Perform a price analysis as appropriate • Perform a contract accounting analysis to confirm that the work directive/task order is within the current authority for contract • Send work directive/task order to Consultant |

| | |
|--|---|
| | <p><u>Contract Close Out</u></p> <ul style="list-style-type: none"> Final evaluation report to be utilized by Procurement in future evaluations |
| <p>Contract Administration Responsibilities</p> | <p><u>Project Progress</u></p> <ul style="list-style-type: none"> In conjunction with Project Manager and the General Counsel, resolve contractual disputes that may arise regarding termination or default <p><u>Change Orders</u></p> <ul style="list-style-type: none"> Perform price analysis as appropriate Prepare contract change document and submit for approval to the Office of the General Counsel; review and approve change orders over \$100,000, change orders that extend the term of the Contract, and change orders that alter the Contractual provisions of the contract. For Service Agreements, send change to Consultant Obtain necessary approvals per signatory requirements <p><u>Contract Close Out</u></p> <ul style="list-style-type: none"> Complete all work under contract requirements Resolve all claims Resolve all questioned cost Reconcile all accounts Notice of Final Payment Issued Complete Final Payment Ensure that all contract files are fully documented, so that they can be closed out. |

Source: M³ Consulting, Procurement Manual, Rev 9, October 2013, Chapter 8: Contract Administration, *See footnote 23 below for definition of Work Directive/Task Order.²⁹⁸

²⁹⁸Work Directive/Task Order—“Scheduled or unscheduled orders to perform specific services, or provide goods, etc. over a specified contract period, fulfilling the District's requirements and used where the District anticipates recurring requirements but cannot predetermine precise quantities or services to be provided and it is inadvisable for the District to commit itself to a minimum quantity or compensation. Funds are obligated by each order (WD or TO), and not by the contract itself. Such orders must be within the general Scope of Work.”²⁹⁸ Procurement Manual, Rev 9, October 2013, I-3: Definitions, p. 16.

**Figure 3.10.
Post Award Responsibilities of Sponsor Department’s Resident Engineers**

| | |
|--|---|
| <p>Resident Engineer Responsibilities</p> | <ul style="list-style-type: none"> • Preconstruction Preparation • Partnering with Prime Consultant • Drawings and Specifications • Daily Record Keeping • Daily Inspection of Work Performed • Testing Materials • Quality Assurance • Construction Progress Meetings • Measurement Progress Reporting • Schedule Control • Review of Contractor's Submittals • Changes to Contract • Internal and External Communications and Maintaining Construction Contract Files • Safety Program • Insurance • Forecasts • Surveying • Dispute Resolution • Interfacing with Utilities/Railroads • BART--Furnished Equipment and Materials • Testing of BART Systems • Work on the Operating BART System • Contacts outside the Organization • Completion of Contract • Completion Reports, Audit Items, and Records • Activities during Guarantee Period |
| <p>Labor Compliance Requirements</p> | <ul style="list-style-type: none"> • Fair Employment Practices • Apprentice Certificates • MBE, WBE, DBE or SB Participation • Monthly MBE/WBE/DBE or SB Participation • Final MBE/WBE/DBE or SB Participation • Labor Deficiencies |

Source: M³ Consulting, Resident Engineer’s Manual, April 2014, Section 4.1, Section 4.5

When On-call²⁹⁹ A&E contracts, the procurement vehicle utilized to secure a substantial portion of BART design and construction services, are used, the post-award process shifts a significant level of procurement decision making to Project Managers.

B. Progress and Advanced Payments

The Project Manager is responsible for checking invoices and approving progress payments. Timely payments to vendors are critical to their cash flow, particularly for small businesses. BART Project Manager's discretion in establishing the frequency and scope of invoicing and payments can impact a vendor's ability to do business with BART.

1. Progress Payments

There are two forms of progress payments allowable by BART:

- Payments based on cost; and,
- Payments based on completion of work.

The Project Manager can consider the utilization of progress payments if:

- The contractor will not be able to deliver the product or complete milestones for a substantial time after work begins; and,
- The contractor's expenditures prior to the bill for first delivery will have significant impact on the contractor's working capital.

Progress payments are made only for cost incurred on the project. Further, BART must obtain title (materials, work in progress and finished goods) for which the progress payments are made.

2. Advance Payments

BART Project Managers also have the discretion to utilize advance payments. These are payments made to the contractor before the contractor incurs contract cost. BART may use local share funds for advance payments. On federally funded contracts, advance payments must be provided in accordance with FTA restrictions and limitations. The Legal Department may provide additional guidance.³⁰⁰

²⁹⁹ A type of indefinite quantity contract utilized for A&E services.

³⁰⁰ Procurement Manual, Rev 9, October 2013, VIII-1: Responsibilities, p. 258.

C. Change Orders, Contract Amendments and Work Directives/Task Orders

Changes to the contract are allowable if they do not deviate from the original purpose of the work or the intended method of achievement. If a change is outside of the scope, a new bid must be let. Improper contract expansions occur when a contract includes a larger scope, greater quantities or options beyond what BART reasonably needs. A cardinal change is one that constitutes a major deviation from the original purpose of the work or the intended method of achievement causing the contractor to perform work different from the original contract.

As outlined above in Figure 3.9, the Project Manager is responsible for negotiating the change, both work and price. The Project Manager is required to assemble a contract change package that includes, but is not limited to, scope of work, schedule, cost estimate, key personnel requirements, work breakdown structure, subcontractors and their scope of work, estimated budgets, work product and warranties. This is forwarded with a recommendation for approval to the Contract Specialist (Procurement).

The Project Manager and/or Resident Engineer will send the scope of work to the Contractor and request a technical and cost proposal. Upon receipt of the proposal from the Contractor, the Contract Administrator will review and send comments to the Project Manager, who will proceed with final negotiations. Final costs are submitted to the Contract Administrator for approval. Contract Specialists are involved in the change order process if a change order is estimated to exceed \$100,000, as at this level, the change order must go to the Board for approval.

The process for the Work Directives/Task Orders is like that for change orders.³⁰¹

Planning, Development and Construction performs a significant amount of procurement functions and project management on BART design and construction contracts.³⁰²

D. Substitutions

Unapproved substitutions of DBE, SB and MWBE firms appear to be a concern amongst BART staff in several different departments, because of its impact on the contract agreement that the prime contractor entered with BART, as well as DBE, SB and MWBE participation. Further, based on anecdotal interviews in Chapter 9 and reports from staff on anecdotal comments made to them by firms doing business with BART, DBEs, SBs and MWBEs are

³⁰¹ Work directives are normally issued against indefinite quantity contracts for specific scopes of work. Change orders are normally issued against definite quantity contracts, when there has been a change in scope or price from the original scope of work.

³⁰² See Figure 3.4 BART Procurement Function, p. 3-12.

concerned about their experiences with unapproved and/or illegal substitutions. Staff expressed concerned that the General Counsel’s interpretation of BART’s ability to intervene into the relationship between the prime and subcontractor placed them on a “slippery slope.” A Contract Specialist described an example of how a contractor took advantage of this situation: A Proposer came in with a minority partner, which was taken into consideration by BART in its award of the contract. However, post-award, the proposer “don't even talk to them now... There's just very little that we could do... It doesn't lend itself so much to subcontracting, but still, to come in with all this fanfare about using and having a minority firm named throughout the proposal all over the place, and then later not even being available to discuss how the work's going to go. That was a pretty extreme case.” OCR staff stated that they have seen substitutions of African American-owned firms. “A lot of African-American firms were substituted off the contract. I don't know if it's a lot, but a good number was substituted out. That's what we're seeing...”

BART’s procurement policies and procedures do not address prime or subcontractor/sub-consultant substitution. BART Boilerplate does address the issue of substitution in GC5.7.1.1 Requirement for Designation:

Contractor shall have set forth on the form provided in the Bid Form, the name and location of the place of business of each Subcontractor who will perform work or labor or render service to the Contractor in or about the construction of the Work, or a Subcontractor licensed by the State of California who specially fabricates and installs a portion of the Work according to detailed drawings contained in the Contract Documents, in an amount in excess of one-half of one percent of the total amount of the Contractor’s Bid, and the portion of the Work which will be done by each such Subcontractor. The Contractor shall not, without the written consent of the District, either substitute any Subcontractor in place of the Subcontractor designated in the original Designation of Subcontractors, or permit any such subcontract to be assigned or transferred, or allow it to be performed by anyone other than the original Subcontractor listed in the Designation of Subcontractors, or sublet or subcontract any portion of the Work in excess of one-half of one percent of the total amount of Contractor’s Bid for which Contractor did not originally designated a Subcontractor other than in the performance of Change Orders causing changes or deviations from the original Contract. District consent for the substitution of Subcontractors will be given only in accordance with State Public Contract Code Section 4107. If the Contractor violates any provision of said Subletting and Subcontracting Fair Practices Act, it shall be liable for the penalty and disciplinary action stated therein. In addition to the requirement to obtain the written consent of the District, the Contractor shall notify the

subject Subcontractor of the Contractor's intention to substitute a Subcontractor in place of the designated Subcontractor and shall furnish acceptable evidence of that notification to the Engineer.

The boilerplate language is consistent with State of California law and 49 CFR Part 26 as outlined below.

1. State of California

Under Public Contract Code 4100-4114, "Subletting and Subcontracting Fair Practices Act," the State of California established rules and regulations regarding subcontractor substitutions to control issues of bid shopping and bid peddling. Under Section 4107, a prime contractor whose bids has been accepted may not:

1. Substitute subcontractors under its original bid unless the awarding authority permits such substitution under the circumstances outlined below;
2. Permit a subcontractor to be voluntarily assigned or transferred or performed by another contractor other than the subcontractor in the original bid, without the approval of the awarding authority; or,
3. Sublet or subcontract any portion of the work more than $\frac{1}{2}$ of 1% of the prime contractor's total bid where there was not a subcontractor designated, other than under change orders causing changes or deviations from the original contract. (4107) Under Section 4109, this is allowable only under documented emergency circumstances.

Per Section 4107, The Awarding Authority may allow substitutions under the following circumstances:

- Subcontractor fails or refuses to execute its subcontract after a reasonable period (BART is 120 days) is provided to do so;
- Subcontractor becomes insolvent;
- Subcontractor fails or refuses to perform;
- Subcontractor fails or refuses to meet bond requirements;
- Prime inadvertently lists subcontractor, due to clerical error;
- Awarding authority determines that work performed by subcontractor is substantially unsatisfactory per specifications and plans or that the subcontractor is unduly delaying or disrupting work progress;

- Subcontractor is not licensed pursuant to Contractors License Law;
- Subcontractor is ineligible to work under Labor Code;
- Awarding authority determines that listed subcontractor is not a responsible contractor.

A prime contractor must submit a written request to substitute to the awarding authority, in this case BART, based on Section 4107.5. The awarding authority must then notify the subcontractor in writing via certified or registered mail of the prime contractor's request. The listed subcontractor has five working days to file written objections to the awarding authority. If none is submitted, the subcontractor will be considered to have agreed to the substitution. If written objections are submitted, then the awarding authority will provide notice within five working days of a hearing.

Based on Section 4108, subcontractors will be required to submit performance and payment bonds requested by the prime contractor. If the subcontractor does not submit the bonds, "upon the request of the prime contractor and at the expense of the prime contractor at the established charge or premium therefore," the prime contractor may reject the subcontractor's bid and make a substitution. Subcontractor bonds may be required only if:

- Amounts and requirements of bonds are clearly specified in written or published request for sub bids;
- If expense of bonds is to be borne by the subcontractor, that requirement must also be clearly specified in the written request for sub bids; and,
- Failure to do so precludes the prime contractor from imposing bond requirements.

Penalties for violating this code include:

- Contract cancellation;
- Assessment against prime contractor of 10% of the amount of the subcontract involved; (4110)
- Additionally, for licensed contractors, disciplinary action by the Contractors State License Board can be imposed, in addition to the penalties above. (4111)

M³ Consulting has been advised that PC 4100 does not apply applied to sub-consultants but is limited to subcontractors in or about the construction site. Under Section 4113, the

definition of contractors is governed by Chapter 9, Division 3 of the Business and Professions Code (7000-7191). Under Article 4, Section 7055, contractors include:

- General Engineering Contractors
- General Building Contractors
- Specialty Contractors³⁰³

2. 49 CFR Part 26

The US DOT also has established regulations regarding the substitution of DBEs. Under 26.53(f), Good Faith Efforts, BART must list that the contractor will utilize the specific DBEs listed to perform the work and, unless BART consents, the prime contractor will not be paid for work or material unless it is performed or supplied by the listed DBE. If a DBE subcontractor is terminated or fails to complete work on the contract for any reason, BART must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. Each prime contract must include a clause that states “failure by the contractor to carry out the requirements of this part is a material breach of contract and may result in the termination of the contract or such other remedies set forth in that section you deem appropriate if the prime contractor fails to comply with the requirements of this section.” Under 2014 Rules, DOT noted that inability to find a replacement DBE at the original price is not alone sufficient to demonstrate good faith efforts.³⁰⁴

E. Contract Closeout

Contract close-out, among other things, occurs when (1) work under the contract is considered complete, (2) BART terminates a contract prior to project completion, or (3) work on a multi-year contract has proceeded to a point where close-out of earlier years is warranted. As part

³⁰³ Those listed as General Engineering Contractors include: “a contractor whose principal contracting business is in connection with fixed works requiring specialized engineering knowledge and skill, including the following divisions or subjects: irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, docks and wharves, shipyards and ports, dams and hydroelectric projects, levees, river control and reclamation works, railroads, highways, streets and roads, tunnels, airports and airways, sewers and sewage disposal plants and systems, waste reduction plants, bridges, overpasses, underpasses and other similar works, pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances, parks, playgrounds and other recreational works, refineries, chemical plants and similar industrial plants requiring specialized engineering knowledge and skill, powerhouses, power plants and other utility plants and installations, mines and metallurgical plants, land leveling and earthmoving projects, excavating, grading, trenching, paving and surfacing work and cement and concrete works in connection with the above-mentioned fixed works.” (7056)

³⁰⁴ 49 CFR §26.53(f).

of the closeout process³⁰⁵, the Project Manager will write a final evaluation report in narrative form of the vendor's performance. This performance evaluation will be utilized by the Procurement Department in future evaluations of vendors seeking new opportunities with BART. Compliance with DBE goals or MWBE Availability percentages is a part of the performance evaluation.³⁰⁶ The Project Manager also completes a Consultant Contract Deliverables Check List to ensure that the contract was completed and that deliverables were received.

3.4 ANALYSIS OF BART DBE AND SMALL BUSINESS PROGRAMS AND NON-DISCRIMINATION FOR SUBCONTRACTING PROGRAM

3.4.1 DESCRIPTION OF DBE AND SMALL BUSINESS PROGRAMS AND NON-DISCRIMINATION FOR SUBCONTRACTING PROGRAM

BART administers two programs targeted to promote inclusion of DBEs and Small Businesses and one program that ensures that primes contracts do not discriminate or give preference in the award of subcontracts based on race, national origin, color, ethnicity or gender. The three programs are:

- Disadvantaged Business Enterprise (DBE) Program which includes SBE elements;
- Small Business (SB) Program; and,
- Non-Discrimination Program for Subcontracting in Non-Federally funded contracts

An overview of each program is provided below.³⁰⁷

A. Disadvantaged Business Enterprise (DBE) Program (Federally Funded)

As a recipient of federal funds from the Federal Transit Administration (FTA), BART's Disadvantaged Business Program has been developed pursuant to the requirements of 49

³⁰⁵ See Chapter 8, Section VIII-5.

³⁰⁶ Procurement Manual, Rev 9, October 2013, VIII-1: Responsibilities, p. 256. "Upon completion of the Consultant/Contractor/Vendor effort and where deemed appropriate, a final evaluation report in a narrative form, prepared by the Project Manager/Sponsoring Department will be sent to Procurement to be used for future evaluation of the Consultant/Contractor/Vendor. The Project Manager will obtain, from the Office of Civil Rights, a report on the Consultant's compliance in meeting DBE goals or Availability Percentages for the project (if applicable), for transmittal to Procurement."

³⁰⁷ We note that BART's Procurement Manual prohibits BART from implementing any procurement practices that give local or in-State Bidders/Proposers preference over other Bidders/Proposers.

CFR Part 26³⁰⁸. The purpose of the DBE program is “to create a level playing field on which a Disadvantaged Business Enterprise (“DBE”) can compete fairly for federally funded agreements, contracts and subcontracts, including but not limited to construction, procurement and proposal contracts, professional and technical services agreements and purchase orders.”³⁰⁹

The BART Board of Directors is responsible for establishing DBE policy and the General Manager is responsible for ensuring adherence to the DBE program. The General Manager as the DBE Liaison has designated the OCR Department Manager. The DBE Liaison must have adequate staff to implement the DBE program and have direct access to the General Manager.

| Figure 3.11. DBE Program Responsibilities | |
|--|--|
| Board of Directors | <ul style="list-style-type: none"> • Establish DBE Policy |
| General Manager | <ul style="list-style-type: none"> • Ensure implementation of DBE Program, including funding • Ensure adherence to DBE Program |
| Office of Civil Rights—DBE Liaison | <ul style="list-style-type: none"> • DBE responsibilities outlined above • Gathering and reporting statistical data as required by FTA and the Board of Directors • Working with appropriate departments to establish DBE goals • Ensuring timely notice of contract opportunities to the DBE community • Identify race neutral inclusion methods, including SBE race neutral methods • Analyzing available resources for establishing and achieving DBE goals • Monitoring overall DBE goal achievement, make adjustments as necessary, report to Board and District • Participate in the bid and contract award process • Advising the General Manager and Board on DBE issues • Maintaining and updating the DBE Directory in conjunction with the California Unified Certification Program (CUCP) • Maintaining and updating the bidders list |

³⁰⁸ 49 CFR Part 26 was enacted on January 8, 1999 and revised on October 1, 2006 and October 2, 2014.

³⁰⁹ San Francisco Bay Area Rapid Transit District Disadvantaged Business Enterprise Program, February 2012, p. 4.

| | |
|----------------------------------|--|
| | <ul style="list-style-type: none"> • Implementing race neutral measures to encourage DBE participation, such as outreach, matchmaking, small business program elements, restructuring and unbundling of contract opportunities, simplifying bonding, surety and insurance requirements • Identify Micro SBE set-aside contracts |
| Procurement Department | <ul style="list-style-type: none"> • Ensuring the inclusion of appropriate provisions of the DBE program are included in all contracts with Federal funds • Ensuring nondiscrimination in the procurement of goods and services • Ensuring that OCR is engaged during the design and conception phase to ensure that contracting is done in the manner most suitable to the involvement of DBEs and SBEs. |
| Office of General Counsel | <ul style="list-style-type: none"> • Advising the Board of Directors, the General Manager and OCR on the implementation of the DBE Program |
| Business Advisory Council | <ul style="list-style-type: none"> • Forum for communication between DBE and SB community and BART • Provide recommendations for improvement of DBE/SB Programs to OCR. |

Source: M³ Consulting

Based on the results of the 2009 Disparity Study, BART could establish DBE goals on Federally Funded Construction contracts only. For Procurement and Professional Services including Architectural and Engineering, BART utilized exclusively race and gender neutral efforts. Most Federally Funded Construction contracts reviewed in the study period contained DBE goals. Their impact is reflected and discussed in Chapter 6: Statistical Analysis of M/W/DBE Utilization.

B. DBE Program Small Business Elements (SBE);

Under the DBE program Small Business Elements, BART includes all reasonable steps to eliminate obstacles to small business participation on Federally funded contracts. SBE program efforts can include:

1. Race neutral SB goals on Federally Funded contracts;
2. MSBE set-asides on federal funded contracts. MSBE set-asides cannot exceed the following limits:
 - o Construction—\$2 million

- Services—\$3 million
- Procurement—\$3 million

MSBE set-asides are not eligible for SBE or DBE goals, although MSBE vendors are encouraged to include SBE and DBE subcontractors. To date, SBE goals have not been utilized by BART and MSBE set-asides have been utilized on three contracts since 2014 in the amount of \$1.3 million, per OCR.

Interviewees noted that BART has awarded some Sustainable On-call contracts, which are directed to small and micro-businesses. Interviewees noted that “it does seem like the small ones struggle with a little bit more when they win as a prime, because they really don't have the resources, the capabilities to manage. They don't really understand what they're getting themselves into.”

C. Small Business (SB) Program (Non-Federally Funded)

BART established a Small Business (SB) Program, pursuant to California Public Contract Code Section 2002. The SB program applies to non-federally funded contract opportunities. The purpose of the SB program is to encourage the full and equitable participation by small businesses in construction, procurement and services contracts. The SB program is targeted to:

- BART award of contracts;
- The award of contracts by Prime Contractors to First Tier Subcontractors; and,
- The award of contracts by First Tier Subcontractors to Second Tier Subcontractors.³¹⁰

The General Manager has designated the Office of Civil Rights for oversight and administration of the SB program. OCR responsibilities include:

- Implementing and monitoring the SB program;
- Establishing goals in contracts and agreements, where there are subcontracting opportunities; and,
- Making amendments to SB program as needed.

³¹⁰ BART Small Business (SB) Program Non-Federally Funded Contracts, 9/01/11, p. 2.

OCR and the Sponsor Department will determine on a case-by-case basis if the bid preference will apply on any non-federally funded contracts. To encourage SB prime participation on contracts under \$10,000,000, BART may, at its sole discretion, apply a bid preference up to 5 percent of the lowest responsible bidder's bid amount up to a total amount of \$250,000 on contracts valued under \$10,000,000. An annual limit of \$2,000,000 for total dollar preferences is allowed each year.

For contracts over \$10,000,000, BART may apply a SB participation goal. For prime vendors that meet the SB subcontracting goal, a bid preference up to 5 percent of the lowest responsible bidder's bid amount up to a total of \$1,000,000 will be applied. However, the actual contract will reflect the amount of the original bid. BART may, at its discretion, count Second Tier Subcontractors toward the SB goal, upon the First-Tier subcontractor meeting the requirements outlined in the SB Program.³¹¹ Under California Public Code Section 20209.5-20209.7, BART may also establish three separate SB goals for construction, services and procurement on Design Build contracts. A 5 percent preference will apply.

D. Non-Discrimination (ND Program) for Subcontracting in Non-Federally Funded contracts (ND Program)

Under Proposition 209 adopted by the State in 1996, BART is prohibited from taking measures that discriminate for or against the participation of firms based on their race or gender, unless required as a Federal grant requirement. Thus, in 1997, the BART Board adopted BART's Non-Discrimination Program for Subcontracting on Non-Federally Funded Contracts (ND Program). Under the terms of the ND Program, the purpose is to ensure that contractors do not discriminate or give a preference in the award of subcontracts based on race, national origin, color, ethnicity, or gender.

Under BART's ND Program, which is a race and gender-neutral program, there has been some measurable MWBE participation although it has not resulted in the overall participation of MWBEs matching availability in BART's Non-Federal construction, procurement, or services contracting. The Disparity Study will provide up to date availability percentages for MBEs and WBEs for the ND Program.

The ND Program does not require a bidder to subcontract any portion of the work. If the bidder does not subcontract any of the work, the ND Program does not apply. Further, the ND Program does not utilize subcontracting percentage goals nor require a bidder to make good faith efforts to utilize minority owned business enterprise (MBE) and women owned business enterprises (WBE) subcontractors.

³¹¹ Ibid, pp. 6-8.

However, if the bidder does subcontract a portion of the work, a determination is first made whether the bidder has listed subcontracts in dollar amounts that reflect the availability percentages of MBEs and WBEs in the pool of all subcontractors available to perform the contract work. The availability percentages for MBEs and WBEs are not subcontracting goals. They are, instead, what MBE and WBE participation would be expected in the absence of discrimination. If the bidder meets the availability percentages, the bidder is presumed to have not discriminated and is eligible for award of the contract.

If the bidder does not meet the availability percentages, the bidder must submit documentation pertinent to determining if the bidder discriminated. If the documentation shows no evidence of discrimination the bidder is recommended for award of the contract. If documentation shows discrimination, a hearing is set before a hearing officer and the District has the burden to prove that the bidder discriminated. A bidder is non-responsive only if it does not cooperate in providing evidence of Non-Discrimination or if a finding is made after a hearing that the bidder has discriminated in the award of subcontracts. A bidder cannot be found non-responsive simply because it did not select subcontractors in a manner which reflects MBE and WBE availability if it has not discriminated.

1. Information Required from Prime Contractors on ND Program

If a bidder utilizes subcontractors at levels reflective of MBE and WBE availability, the following information is required at the time of bid:

- Dollar amount of each subcontract and statement of scope of work;
- Identification of each MBE and WBE, along with name, address, and telephone number; and,
- Proof that the subcontractor is an MBE or WBE.

If a bidder utilizes subcontractors at levels not reflective of MBE and WBE availability percentages, the bidder must provide the following information:

- a. Separately for each subcontract, the name, address, telephone number, ethnicity and gender of the owner of each business entity that was listed as a subcontractor.
- b. Separately for each subcontract, the name, address, telephone number, ethnicity and gender of the owner of each business entity that submitted a bid, but was not selected as a subcontractor.

- c. Separately for each subcontract, the name, address, telephone number, ethnicity and gender of the owner of each business entity that expressed an interest, on the telephone or in writing, in bidding for the subcontract, but did not do so.
- d. For each subcontract where a MBE or WBE was not selected, copies of the bids submitted by the non-MBE/WBE, who was selected, and the bids submitted by each MBE and WBE. The bid documents covered by this paragraph shall contain at least the following information: the bid amount and a description of the scope of work. If some or all the subcontractors who bid the job submitted no written bids, the bidder shall provide a written statement containing the amount of each oral bid.
- e. Separately for each subcontract where the listed subcontractor is a non-MBE/WBE, a full and complete statement of the reason(s) that the non-MBE/WBE was selected as the subcontractor, and a MBE or WBE was not selected. If the reason is based on relative qualifications, the statement must address the qualifications at issue. If the reason is the respective dollar amounts bid, the statement must state the amounts and describe the similarities and/or dissimilarities in the scope of work covered by the bids.
- f. A statement describing any efforts the bidder may have made to ensure Non-Discrimination for Subcontracting, including a description of any advertising and other out-reach efforts.

A bidder may be found non-responsive if it does not cooperate in providing evidence of non-discrimination on a timely basis. OCR will make a determination of within 15 days of receipt of the bidder's information. A determination by OCR that a bidder did not discriminate is final and not appealable.³¹² If OCR decides that a hearing is needed to determine if the bidder has discriminated, the bidder will be provided notice within five days after OCR has made its decision. The hearing will begin no later than 14 days after notice is provided. "The only issue to be resolved by the hearing officer is whether the Bidder discriminated in its selection of one or more subcontractors." The hearing officer will issue a written recommendation within ten days of completion of the hearing. To date, BART has never found a bidder to have discriminated. There is also a hearing if a bidder does not cooperate or timely provide the responses to the six questions when requested.

3.4.2 REVIEW OF BART DBE, SMALL BUSINESS AND ND PROGRAMS

Within the current organizational and legislative construct, M³ Consulting sought to analyze BART's current DBE, Small Business and ND programmatic initiatives. As discussed previously, M³ Consulting reviews BART's DBE, Small Business and Non-Discrimination

³¹² Ibid, VI(5), Enforcement/Hearing Procedures.

Programs to determine its effectiveness in the context of the Six Essential DBE, SBE and MWBE Program Elements. Unless specifically delineated, efforts will be discussed as it relates to all three programmatic initiatives.

| Figure 3.12. M³ Consulting Six Essential DBE, SBE and ND Program Elements | |
|---|---|
| 1. Outreach and Matchmaking | Efforts to increase the business community’s awareness of an entity’s procurement and contract opportunities and match DBEs and SBs to specific contract opportunities. |
| 2. Certification | Eligibility criteria for DBE, SB and MWBE participants. |
| 3. Technical Assistance | Informational and strategic support of businesses to meet the entity’s DBE and SB plan objectives. |
| 4. DBE and SB Inclusion in Bid Opportunities | The mechanism by which the entity assures that material consideration of DBE and SB participation is given in the award of a contract. |
| 5. Contract Compliance | Ensuring adherence to DBE and SB plan goals on all contracts after execution of the contract. |
| 6. Organizational Performance Evaluation | A comparison of performance results to the entity’s goals to determine policy successes, strengths and weaknesses, and performance improvement areas. |
| Source: M ³ Consulting | |

A. Outreach and Matchmaking

BART OCR engages in numerous outreach efforts, as reflected in Figure 3.13 below. BART Contract Specialists engage in DBE and SB outreach based on individual habits and commitments to inclusion. To further engagement, Contract Specialists also participate in Vendor Fairs.

| Figure 3.13. BART 2014 Outreach Efforts | |
|---|---|
| Outreach Event | Outreach Topic |
| BART-Understanding Construction Sub-Contracts Workshop | Practical tips on reading & analyzing construction contracts, spotting problematic clauses, negotiating & strengthening ability to secure beneficial contracts. |
| Business Opportunity Council & Foundation for Fair Contracting (labor compliance) | Labor Code/Code of Regulations, Contractor Responsibilities, Determinations, Reporting Forms, |

Chapter III Procurement Analysis

| | |
|--|--|
| -Prevailing Wage Workshop | Apprenticeship Standards and Legislation & Legal Requirements |
| Alameda County Public Works Agency-Utilizing Business Certification for Growth | Upcoming Bidding Opportunities and Certification (including DBEs & SBEs) |
| Sacramento Valley 8(a) Association Meeting | Small Business Supportive Services, Certification(s), including DBEs & SBE, and Upcoming Bidding Opportunities |
| BART, City of Hayward & Alameda County-Contractor's Workshop | Upcoming Bidding Opportunities and Certification (including DBE & SB) |
| BART-Stop Notice & Bond Claims Workshop | Stop Notices and Bond Claims |
| US Pan Asian American Chamber of Commerce & Wells Fargo-Procurement Connections & Networking Reception | Procurement & Networking |
| San Joaquin County Hispanic Chamber of Commerce & Builders Exchange of Stockton | Upcoming contracting opportunities, Best Practices and Certifications, including DBE & SB |
| BART- Insurance Education Workshop | Insurance: Understanding Exposure, Markets, Limits of Coverage, Worker's Comp, General & Professional Liability. |
| BART-Small Business Assistance Program Kick Off | Surety Bonding |
| BART-Disabled Veterans Business Enterprises Info Forums | Contracting Opportunities, Small Business Programs, Certification Requirements and Bonding Program. |
| Turner Group Construction-Contractor Workshop(s) | Bonding, Finance, Legal, Project Management, Safety & Bidding |
| BART-Northern California Transit Agencies Vendor Fair | Staff discussed the District's Procurement and OCR Process. Procurement entailed information of current and future bidding opportunities. OCR covered the DBE/SBE/MSBE Certification and Non-Federal Small Business Prime Preference and Non-Discrimination for Subcontracting |
| Bay Area Business Roundtable-Business Expo Workshop | Connecting with public/private agencies that have open requisitions and contract opportunities. |
| Business Outreach Council (BOC) | Topics included: 1) prime contractors' experience working with subcontractors; 2) advise the public of upcoming projects; 3) provide workshops on bonding, insurance, certification, and to give opportunities for Small and Disadvantaged Businesses to network with Prime Consultants and Contractors. |
| Alameda County Public Works Agency | Topics include: 1) Benefits of the Bay Area Builders Exchange and Doing Business with BART, East Bay Municipal Utility District (EBMUD), and General Services Administration (GSA), and AC Transit. |
| BART's Office of Civil Rights " Meets with the Primes" | Discussion on obstacles and best practices with DBE subcontractors on BART contracts. |
| BART's Office of Civil Rights "How to Do Business with Bart" Outreach Meeting | Topics Discussed were: 1) How to do Business with BART; 2) BART project updates; 3) upcoming bidding opportunities; and 4) effective bidding process. |

Source: BART OCR; M³ Consulting

OCR sponsors matchmaking sessions, in conjunction with pre-bid conferences. Matchmaking does not occur on all projects. The Procurement Department and Planning, Development and Construction may be engaged in assisting with the matchmaking session. Matchmaking is not conducted around annual budgeting or long-term capital budgets, nor are they conducted around the General Manager’s Contracting Plan process, designed to unbundle contracts prior to initiation of the bid process.

B. Certification

BART certification requirements are different for the DBE, SBE and ND programs as detailed in Figure 3.14.

| Figure 3.14. Certification Requirements for BART DBE, SBE and ND Programs | |
|--|--|
| DBE Program | |
| DBE Eligibility | <ul style="list-style-type: none"> Disadvantaged Business Enterprise—a for-profit, small business concern (1) that is at least 51% owned by one or more socially and economically disadvantaged persons or in the case of a corporation, where at least 51% of the stock is owned by one or more socially and economically disadvantaged persons and (2) whose management and daily operations are controlled by one or more socially and economically disadvantaged persons. Socially and Economically Disadvantaged Individuals—Black American; Hispanic American; Native American; Asian-Pacific American; Subcontinent Asian American; A woman; or a member of any additional group that is designated as socially and economically disadvantaged by the Small Business Administration. BART certifies DBEs based in Alameda and Contra Costa Counties. DBEs based in San Francisco County are certified by SFMTA and DBEs based in San Mateo County are certified by SAMTRANS. |
| Personal Net Worth | <ul style="list-style-type: none"> Includes only his or her own share of assets held jointly or as community property with the individual’s spouse. Personal Net Worth cannot exceed \$1.32 million. |
| Non-Residence Certification | <ul style="list-style-type: none"> To benefit from BART’s race and gender conscious program, a DBE must show that it has attempted to do business in BART’s market area BART’s market area consists of Alameda, Contra Costa, San Francisco and San Mateo Counties. |

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| | <ul style="list-style-type: none"> • A DBE must show that it has attempted to do business in BART’s market area within 2 years prior to advertising date of solicitation |
| California Uniform Certification Program | <ul style="list-style-type: none"> • CALTRANS coordinates the CUCP and hosts the master list of certified DBEs for all the state’s certifying agencies. |
| Counting and Tracking DBE Participation | <ul style="list-style-type: none"> • Expenditures may be counted if the DBE is performing a commercially useful function. • Materials and supplies obtained from a DBE manufacturer, 100 percent will be counted. • Trucking will be counted in accordance with 49 CFR 26.55. |
| SBE Eligibility | <p>BART certifies Small Business Enterprise—an existing small business, as defined by Section 3 of the Small Business Act and Small Business Administration, whose average gross revenues over the last 3 years does not exceed \$23.98 million, pursuant 49 CFR 26.65(b).</p> <ul style="list-style-type: none"> • SBE—a firm that is at least 51% owned by one or more individuals whose Personal Net Worth does not exceed \$1.32 million. |
| MSBE Eligibility | <ul style="list-style-type: none"> • BART certifies Micro Small Business Enterprise—a firm that is at least 51% owned by one or more individuals whose Personal Net Worth does not exceed \$1.32 million and whose average gross revenues over the last 3 years does not exceed • \$10 million for construction; \$6 million for professional services and procurement or the applicable SBA limit for their work category, whichever is less |
| SB Program | |
| Eligibility | <ul style="list-style-type: none"> • Small businesses certified by the California Department of General Services; • Principal office located in California; • A business with fewer than 100 employees; and, • If not a manufacturer, have average annual gross receipts of \$14 million or less over the previous 3 tax years. |
| Non-Discrimination for Subcontracting (ND) Program | |
| Eligibility | <ul style="list-style-type: none"> • BART certifies MWBEs. Certified DBEs are presumed to meet the requirements of ND MWBE certification. |

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| | <ul style="list-style-type: none">• Eligible MBEs must be 51% owned and controlled by one or more minority individuals.• Eligible WBEs must be 51% owned and controlled by one or more women individuals.• Firm ownership must be real, substantial and continuing, going beyond pro forma ownership as reflected in ownership documents.• Minority women-owned firms may be counted towards both the MBE and WBE availability percentages |
|--|---|

Source: BART OCR; M³ Consulting

C. Technical Assistance

BART's technical assistance efforts consist primarily of on-site audits and contractor interventions, outreach sessions as outlined above in Figure 3.13, in addition to Small Business Supportive Services (SBSS) provided on two large capital projects.

The BART Office of Risk Management sponsored the Small Business Bonding Program, with support from OCR. As stated previously, during the course of this study, the bonding program was discontinued. The Bond Program was designed to assist contractors to obtain bid, payment and performance bonds. The program also sought to build firm capacity. While the program was titled as a bonding assistance program, the actual services provided appeared to expand to other areas of Management, Financial and Technical Assistance. The key purposes of the program were to:

- Assist BART in its goals of Contracting Diversity including increased opportunities and inclusion of small business contractors
- Remove the barriers, such as bonding which have disadvantaged small and minority contractors from bidding and engagement on BART projects
- Using an aligned risk management strategy to increase contractor's capacity to participate on BART projects both as subcontractors and primes, while maximizing protection of BART resources
- Assist BART with synthesizing the program with the other programs, tactics and resources OCR has already established

The key elements of the program included the following:

- Contractor Program Outreach

- Bondability Assessments & Consultation
- Coordination of Technical Assistance
- Contractor Development & Capacity Building
- Third Party Funds Administration
- Post Award Contract Monitoring and Collateral Management
- Contractor Profile Development
- Workshops / Seminars

Important to the effective execution of the above services were the one-on-one assessments and consultation provided by a team of professionals. Although it has recently been discontinued due to cost concerns and low level participation, BART had a component of the overall bond program that could provide bond guarantees up to 40 percent of the bond amount or \$750,000, whichever was less.

BART has secured the services of an Ombudsperson who provides mediation and dispute resolution services on BART construction and procurement contracts. This program continues to exist. The responsibilities of the Ombudsperson are:

- Assist in the resolution of contract problems which DBE, SB and MWBE consultants and sub-consultants may encounter in the performance of their contract work;
- Conduct thorough, impartial inquiries to satisfactorily resolve contractual issues;
- Mediate disputes between DBE, SB and MWBE sub-consultants and their primes;
- Provide detail reports to OCR regarding outcomes of mediations, including recommended follow up.

These programs are important because, based on interviews, Sponsor Department Project Managers do not intervene into the relationship between a prime vendor and its subcontractors, unless a stop work notice is issued typically for non-payment. Further, based on interviews, because BART's projects are very large, many DBEs, SBs and MWBEs do not have the capacity to perform as prime contractors or the ability to wait for the duration of the BART Payment Process.

During the study period, OCR provided support to small businesses to help them overcome barriers. For example, the bonding assistance program and the project specific small business supportive services on the Warm Springs Extension and Earthquake Safety Contracts.

While most firms, regardless of size, do not have the capacity to serve as primes on BART’s largest projects, which can be as much as \$300 million, one procurement staff member noted that that capacity fluctuates amongst all contractors, and particularly small contractors. “There’s times when things are really good and times when they’re not. There’s times when we seem to be pulling a lot of people here, and there’s times when we’re begging people to bid on this stuff. That’s how it works. A lot of that does fluctuate to the economy. The companies that are still in business, these companies, they float in and out. Sometimes our requirements discourage a lot of contractors to bid it.” When prime contractors combine lack of capacity with poor treatment, another interviewee stated this is a disastrous combination.

When compared to successful DBE Race and Gender Neutral initiatives, BART has clearly established policies, procedures and practices in the following areas:

| Figure 3.15. DBE Race and Gender Neutral Efforts | |
|--|--|
| Race and Gender Neutral Efforts to Obtain DBE Goals | BART Effort |
| 1. Arranging solicitations, times for presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE and other small businesses participation | No specific efforts targeted to increase inclusion of DBEs. |
| 2. Providing assistance in overcoming limitations such as inability to obtain bonding or financing | BART Small Business Bonding Program (one component of the program has recently been discontinued) |
| 3. Providing information and communication programs on contracting and business procedures as well as specific contract opportunities | BART Outreach Activities (See Figure 3.11) BART Notices to Ethnically Focused Newspapers; Select matchmaking sessions |
| 4. Implementing a supportive service program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other SBs | BART’s Small Business Support Services; Only as it relates to BART Small Business Bonding Program; individual capacity building support on select BART projects as possible within BART’s resource; i.e. Warm Springs Small Business Support Program |
| 5. Providing services to help DBEs and other SBs improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency | BART Small Business Bonding Program; individual capacity building support on select BART projects as possible within BART’s resources; Unbundling; Small Business Preferences. |
| 6. Establishing a program to assist new, start-up firms, particularly in fields in which participation by SBs has been historically low | Only as it relates to BART Small Business Bonding Program; individual capacity building support on select BART projects as possible within BART’s resources |

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| 7. Ensuring distribution of the District's DBE data base through print and electronic means to the widest feasible range of potential prime contractors | DBE certification list available on BART's website |
| 8. Assisting DBEs and other SBs to develop their capability to utilize emerging technology and conduct business through electronic media | Only as it relates to BART Small Business Bonding Program; individual capacity building support on select BART projects as possible within BART's resources |
| 9. Unbundling larger contracts when feasible into a series of manageable projects to facilitate participation by SBs | General Manager developed a Contracting Plan process in late 2013 to review upcoming projects for unbundling possibilities prior to the commencement of the bid process |
| 10. Conducting internal training seminars to facilitate better understanding among project managers and engineers regarding the DBE Program objectives | On occasion, BART provides internal training seminars. |
| 11. Maintain a web site containing information on DBE certification, DBE Program, DBE procedures and a database of DBE firms | DBE certification list available on BART's website |
| 12. Ensuring that the District's SB Elements are open and available to all small businesses, including DBEs | SB elements available on BART's website |

Source: BART DBE Program; M³ Consulting

D. DBE and SB Inclusion in Bid Opportunities

Outreach and Matchmaking, Certification and Technical Assistance set the stage for the actual bid process. This section reviews BART efforts in including DBEs and SBs in BART procurement and contracting opportunities.

- **Advertisement**—BART must advertise formal bids in one local newspaper. OCR, in compliance with federal requirements and outreach efforts, informs numerous ethnically focused newspapers of BART opportunities.
- **Notice on BART Website**—Competitive bids and RFPs are posted on the BART website. Informal Procurement is not. Potential vendors only have knowledge of these opportunities if contacted directly by a BART Contract Specialist or Buyer.
- **Solicitation**—On Informal Procurement, Contract Specialists and Buyers are only required to secure quotes from 1 to 3 vendors. These vendors can be contacted via email or phone. On formal purchases, Contract Specialists and Buyers are encouraged to solicit from as many qualified vendors as possible. As a matter of practice, most Contract Specialists appear to contact OCR for the identification of potential DBEs.

The degree of effort also appears to be driven by whether there is a goal or preference on the particular contract opportunity.

- **Bid Review**—On contracts with a DBE goal, OCR conducts a bid analysis on each formal BART procurement and contract opportunity to determine adherence to stated project goals. The bid analysis is performed primarily on the top 3 bidders.

Further, based on the Procurement Manual, for Federally funded procurements, the District is responsible for ensuring that:

- Lists of certified DBEs are made available to bidders;
- Bidders are encouraged or required to include DBEs or make good faith efforts to do so;
- Bidders are encouraged to divide work, where appropriate, into economically feasible tasks or quantities so as to encourage DBE participation; and,
- Targeting advertisement notices in minority-owned newspapers, such as the Sun Reporter, Philippine News, California Voice, El Mundo Spanish Weekly, in addition to other newspapers of general circulations.

Important tools utilized to encourage DBE and SBE participation on BART contracting opportunities are goals, set-asides and preferences. BART’s DBE Program and Non-Discrimination for Subcontracting Program appear to be primarily subcontractor-focused programs. Under the SBE program, BART utilized only 3 micro small business set-asides, since the inception of MSBE set-asides in 2014. The Non-federally-funded SB program affirmatively states, as outlined above that it targets participation at the prime, first tier subcontractor and second tier subcontractor levels. Below is a table of those procurement areas in which BART may by current policy establish goals and preferences.

| Table 3.1. BART Procurement Types on Which Goals, Preferences or Availability Percentages Can Be Established | | | |
|---|------------------|------------------|------------------------------------|
| Current DBE Overall Triennial Goal: 23 percent | | | |
| | DBE Goals | SBE Goals | ND Availability Percentages |
| Construction | Yes | Yes | Yes |
| Construction Management | No | Yes | Yes |
| A&E | No | Yes | Yes |
| Professional Svs | No | Yes | Yes |
| Other Svs | No | Yes | Yes |
| Procurement | No | Yes | Yes |

Source: BART OCR, M³ Consulting

OCR determines the goals, with input from the respective Sponsor Departments. Procurement has limited involvement in goal setting.

The DBE project goal setting methodology utilized is as follows:

- Determine the work categories where there is the potential for subcontracting opportunities;
- Determine the number of DBEs in the database in each work category;
- Determine the dollar value of each work category, where there appears to be a sufficient number of DBEs available; calculate the total dollar value of the eligible work categories;
- Calculate the dollar value of eligible categories against the total value of the project. The percentage calculated represents the raw DBE goal;
- Determine whether raw DBE goal should be adjusted downward due to the magnitude of a particular work category and the limited number and/or capacity of available DBEs.

Contractors are required to make good faith efforts to meet the DBE goal. Evidence of good faith efforts can include:

- Pre-bid meetings—bidders should attend pre-bid meeting or matchmaking session;
- Identification of subcontracting opportunities—bidders must identify work categories for subcontracting opportunities and certified and capable DBEs within these work categories; bidder must document its efforts;
- Advertisement—bidder must advertise subcontracting opportunities no less than 21 days prior to bid opening date, BART bid schedule permitting; Advertisements must be placed in 3 or more daily or weekly minority or women focused trade organization newspapers, publications, or other media;
- Communications with DBEs—bidder will mail registered or certified letters no less than 21 days before bid opening to no less than 10 (or 100% of those available) DBEs capable of performing the identified work categories with which the bidder is willing to subcontract;³¹³ Email blasts are also utilized to fulfill this requirement;

³¹³ See DBE Appendix, p. 34 for required contents of letter, including bond and insurance payments and bond waivers.

- Follow-up of initial solicitation—a bidder representative with knowledge of the project will follow up with DBEs within 10 days of mailing of solicitation letter; proper documentation of follow-up should be maintained;³¹⁴
- Responses from Interested DBEs—bidder must maintain an appropriate record of responses as outlined in the DBE Appendix; and,
- Bidder evaluation of Interested DBEs—Each bidder will submit documentation of its evaluation of bids or proposals received.

Unbundling has been noted by Interviewees as a key tool utilized to render opportunities to small businesses. Some noted that they have seen some success from the programs. Most persons interviewed were generally supportive of the unbundling initiative. However, interviewees expressed concern over the additional workload requirements with one stating that “Because, see, what's happening now is I am taking work home. I'm doing work on the weekends, I'm doing work on weekday nights just to prepare for the next day... I get behind on my other work. That's what unbundling does.”

One interviewee noted that “All in all, it certainly comes down directly from the General Manager, that she's fully behind all these things - These things - the council, the small business program, the bonding program, the unbundling, the contract plans - none of that existed five years ago. It's all things that have been coming forward, directed at trying to get into the community and trying to make it easier.”

E. Contract Compliance

During the study period, OCR is unable to conduct extensive contract compliance of BART contracts. Interviewees stated that OCR conducts monitors of approximately 30 percent of BART contracts. Project Managers do not conduct any OCR-related reviews, audits or inspections, as part of their project management responsibilities in ensuring that contractors are meeting their contractual obligations. One interviewee said if these responsibilities were added to their checklist, they would perform, as it would be officially a part of their job requirements.

The Vendor Payment Tracking System (VPTS) was recently developed by IT for OCR to assist with tracking of payments to subcontractors and is a module under Financial Supply in PeopleSoft. All vendors with subcontractors are contractually required to report payments to subcontractors, with a particular focus on DBE, SB and MWBE subcontractors. The VPTS allows Vendors to report subcontractor values and payments online. OCR then confirms vendor reported data by reviewing payment applications submitted to Planning,

³¹⁴ Ibid. at 34. Follow-up documentation requirements.

Development and Construction. The VPTS allows OCR to meet its requirement to track DBEs that are performing a commercially useful function and to track whether prime contractors are meeting prompt payment requirements³¹⁵. The DBE Bid Analysis, along with the VPTS, allows BART to maintain a listing of DBE bidders and sub-bidders. BART did not consistently collect information on the sub-bidder's scopes of work, which would allow additional sub-bidder analysis by procurement type and/or commodity area. BART began to collect this data more consistently in 2013.

BART also submits semi-annual FTA Uniform Report of DBE Commitments/Awards and Payments. The report includes awards, commitments and payments by race conscious, race neutral and overall goals.

1. Post Award Subcontractor Complaint Process

BART outlines the DBE requirements for resolving subcontractor issues. We note the discussion above under Technical Assistance where BART has secured the services of an ombudsman to assist with these requirements. The resolution process shall include the following elements:

- **Initiation**—The process starts when DBE subcontractor submits a written complaint to OCR, which will be distributed to Project Manager, Resident Engineer and OCR DBE Manager;
- **Investigation and Assessment**—OCR will collect relevant evidence and determine within 10 days whether the issue has merit; if the issue has merit, OCR staff will meet with RE to seek a resolution. If they are not able to obtain a resolution, then the following escalations may occur, in the order listed:
 - PM and OCR DBE Manager;
 - The Group Manager of the Sponsor Department and the OCR Department Manager; At this point, an ombudsmen investigation may be initiated;
 - Assistant General Manager, Planning, Development and Construction and Deputy General Manager.

F. Organizational Performance Evaluation (Scorecard)

This area seeks to determine BART's efforts to evaluation the overall performance of all BART Departments in meeting BART's DBE, SBE and ND stated goals and objectives. BART

³¹⁵ Under the DBE Core Program Prompt Payment requirements, prime contractors are to pay subcontractors within 7 days of receipt of its payment from BART.

does not include diversity and inclusion criteria in its individual performance evaluations. While Internal Audit conducts Organizational Performance Evaluations, there was no audit or scorecard information on BART's effectiveness in executing DBE, SB and MWBE policies, procedures, regulations, laws and objectives.

OCR must meet the requirements of the FTA Triennial Review, which requires FTA to conduct a review at least every three years to "evaluate completely the performance of a grantee in carrying out its program, specifically referring to compliance with statutory and administrative requirements." The Triennial Review, conducted over a three-day period, did not include a detailed review of BART's Procurement and DBE program akin to this Procurement Analysis.

Based on DBE requirements, BART has established the Business Advisory Council, which meets every two months. This Council provides input to BART on issues faced by DBEs and SBs in attempting to do business with BART and feedback on enhancements and improvements to BART procurement operations to promote inclusion of DBEs and SBs.

3.5 IMPACT OF BART POLICIES, PROCEDURES AND PRACTICES ON DBES, SBS AND MWBES

Based on the foregoing discussion and findings, there are a number of Procurement and DBE, SBE and ND Program policies, procedures and practices that have both positive and/or negative impacts on the ability of DBEs, SBs and MWBEs to participate in BART's procurement and contracting opportunities.

3.5.1 POSITIVE ATTRIBUTES

A. Forward Looking Leadership

The current BART General Manager is forward thinking and proactive regarding the development of an overall program that espouses diversity, inclusion and non-discriminatory practices. As long as the General Manager continues to challenge the organization, BART has the opportunity to address challenges discussed below in a manner that eliminates and replaces them with positive transformative attributes.

B. Mission That Matters

District-wide, BART has continuously shown a concern and commitment toward equity and community economic development in the Region, as illustrated in both its 2008 and 2015 Strategic Plans and Mission Statements. Its 2008 Mission Statement reads that BART will:

Provide safe, clean, reliable and customer-friendly regional public transit service that increases mobility and accessibility, **strengthens community and economic prosperity** and helps preserve the Bay Area's environment.

The 2015 Strategic Plan developed the triple objective of providing leadership and partnership in the Region through Economy, Equity and Environment. These Mission statements or charge to the organization has the potential to impact the community. However, in order to make a difference in the ability to do business with BART, this concept must be infused throughout the policies, procedures and practices within the procurement process.

C. Components of a Comprehensive Procurement System and Essential Elements for an DBE, SBE or MWBE Program

All ten components of a comprehensive procurement program are present in at least some form in the current BART procurement process. The need for enhancement is not unusual

for a large institution and BART should be commended for taking on this assessment of its Procurement System.

Four of the six essential elements for a DBE, SBE or MWBE Program, (1) Outreach & Matchmaking, (2) Certification, (3) Technical Assistance, and (4) DBE and MWBE Inclusion in Bid Opportunities, are in place to varying degrees.

D. Organizational Structure & Procurement Process

The organizational structure of BART, at its core, is designed to maintain checks and balances throughout this large decentralized organization. It conforms to a number of the Best Practices seen in many large institutional organizations.

Although there is room for improvement with regard to the sufficiency of the written policies and transparency, the skeletal configuration of the procurement process is decently satisfactory. Policies and procedures are detailed and in most instances, clear.

In recent years, there has been efforts to simplify and streamline procurement processes. These efforts are on-going.

E. DBE, SBE and ND for Subcontracting Programs

BART has enhanced its efforts to increase the business community's awareness of its procurement and contract opportunities and match DBEs and SBs to contract opportunities at prime and subcontracting levels. It has also clarified its eligibility criteria for DBE, SB and MWBE participants and provided informational and strategic support of businesses to meet the entity's DBE, SBE and ND Program objectives.

Although it is not yet comprehensive, BART has developed some policies and processes to ensure, at least, partial consideration of DBE, SB and MWBE participation is given in the award of a contract. A Procurement Portal has also been developed in attempt to develop the critical ability to implement significant outreach to DBE, SB and MWBE participants. The Vendor Payment Tracking System has been developed to monitor subcontractor commitments and payments.

3.5.2 SIGNIFICANT CHALLENGES

While BART has attempted to create greater scope, cost and schedule efficiencies in the current organizational structure, there are several processes and practices that may create barriers to DBE, SBE or MWBE participation in BART's contracting and procurement opportunities. Below is a discussion of issues impacting a procurement environment at BART that is open, fair, inclusive and transparent:

A. Lack of integration of diversity and inclusion throughout BART's Strategic Plan minimizes organizational focus on achievement of DBE, SB and MWBE inclusion in BART opportunities as a policy objective.

As a public entity that procured over \$1 billion in goods and services during the four-year period for this Disparity Study, BART has significant impact on the local economy. BART has recognized its influence and responsibility to the citizens it serves in both its 2008 and 2015 Strategic Plans. In these plans, BART's commitment suggests an intentionality about diversity, equity and inclusion. However, upon detailed review of the Strategic Plans, the diversity objective is principally focused on employment. Workforce diversity is but one type of diversity needed to ensure that BART meets its strategic diversity objective.

By not connecting its inclusive procurement objectives, which include DBE, SB and MWBE participation, to the Strategic Plan, BART foregoes the opportunity to change BART's organizational culture from viewing these initiatives as an appendage to the organization's mission to a vital part of achieving BART's mission. This lack of connectivity lessens the opportunity for BART to achieve its economic prosperity mission and diversity, inclusion and equity objectives through race- and gender-neutral procurement means. It also increases BART's dependency on race- and gender-conscious goals to secure participation of all of its citizens, including DBEs and SBE, in the procurement and contracting opportunities at BART. It further reduces BART's influence on its vendors who agree to achieving BART's mission.

B. Decentralized procurement function reduces BART's ability to develop an inclusive and sustainable procurement operation; lack of ERP integration further exacerbates problems caused by decentralization.

An organization may choose a centralized or decentralized procurement operation and achieve inclusive procurement. However, once the organization has made that choice, to be effective, efficient and inclusive, the organization must intentionally build a procurement infrastructure that supports its choice of centralization or decentralization.

BART appears to operate in a decentralized procurement environment. It further appears that this choice is heavily driven by Sponsor Department project management needs. Staff identified in their interviews project management priorities, which can negatively impact the ability of small, minority and women-owned businesses to participate in BART procurement opportunities at the prime and subcontracting levels. Issues that may negatively impact DBEs, SBs and MWBEs are outlined below:

- The project management process at BART, as it relates to BART's contractors, is designed to provide maximum flexibility to BART's project managers, Resident Engineers and prime contractors to achieve project schedules. BART Procurement Department's involvement is reduced primarily to the administrative tasks of handling the bid process. This focus minimizes BART Procurement Department's involvement in a manner that allows for strategic planning as it relates to achieving BART's mission, designing inclusive procurement strategies, ensuring as much competition as possible on BART projects and ensuring that BART obtains the best value.
- The project management priority and flexibility also reduces the necessary checks and balances critical to inclusiveness, openness and transparency in a decentralized procurement environment. Although BART has implemented several layers of approvals, these approvals do not replace the strategic involvement and oversight needed from the Procurement Department.
- BART's decentralized environment and project management focus reduces BART's ability to maximize the inclusion of DBEs, SBs, and MWBEs in a race- and gender-neutral environment. BART's inclusive procurement initiatives become primarily a subcontractor program. BART's staff is not held responsible for or evaluated on how and whether they are meeting the objectives of an inclusive procurement environment.
- The "checks and balances" is further hampered by a lack of systems integration throughout BART. BART's ERP system currently does not easily meet either procurement or project management needs, thereby minimizing monitoring and reporting on pre- and post-award contracting activity and levels of DBE, SB and MWBE participation in that activity. As such, the ability to engage in inclusive and sustainable procurement is further hindered.
- Because diversity, inclusion and equity objectives have not been integrated throughout the Strategic Plan, it is unclear in this decentralized environment if achievement of inclusive procurement, which includes both race- and gender-

conscious and race- and gender-neutral initiatives, is the responsibility of the entire organization, with different Sponsor Departments having clearly outlined responsibilities; or if the Procurement Department is responsible for ensuring the achievement of inclusive procurement objectives, including DBE and SB goal attainment, and reporting such to the Board of Directors and the General Manager.

C. Minimal procurement forecasting reduces BART’s ability to engage in effective planning to meet BART’s Strategic Mission of “economic prosperity” and to achieve inclusive procurement through its procurement opportunities.

BART’s Procurement Department forecasts procurement opportunities approximately 3 to 6 months in advance, even though its Procurement Manual suggests 12 to 18 months in advance is the desired goal. The Resource Documents (Annual Budgets) does not report for the purposes of procurement forecasting and planning. The shortened forecasting period impacts the lead-time that BART has to create effective and inclusive outreach and matchmaking strategies.

BART also does not indicate, via its website or other means, small dollar purchases it anticipates in the upcoming year. Firms are only aware of these opportunities if there is an inquiry from a Buyer seeking vendor quotes. Given that these small purchases are reflective of procurements where small firms have the greatest capacity and ability to perform, lack of notice of these opportunities reduces small firm ability to submit quotes. During the course of this study, OCR and the Procurement Department have been reviewing DBE, SB and MWBE participation in these small dollar opportunities per the request of the General Manager.

D. Underdeveloped vendor registration impacts BART’s ability to effectively identify DBEs, SBs and MWBEs “ready and willing” to bid on BART opportunities, as well as reduces BART’s ability to establish tailored project goals.

Until January 2016, BART did not have an online vendor portal. It depended on an ACCESS Database maintained by Procurement Support that contained a list of approximately 2,000 prospective vendors. Lack of a well-developed vendor registration process impacts competitiveness and inclusiveness in the following ways:

- Minimizes the ability to develop project-based goals based on those firms that are “ready and willing” to do business with BART. Focusing on BART’s vendor pool, which should include certified DBEs, SBs and MWBEs, allows BART to identify those firms who *believe* they have the requisite experience, expertise and capacity to sell BART-*specific* goods and services.

- Reduces competition by reducing the number of firms that automatically receive both informal and formal notice of BART's opportunities.
 - Increases the potential for favoritism, as the current practice is that BART Buyers and Contract Specialists seek input first from the Sponsor Department and then augments the Sponsor Department list, only where and when deemed necessary.
- E. While sealed bid and RFP processes are consistent with industry practice, over-reliance on broad On-call contracts reduces BART's ability to ensure inclusiveness and sustainability in these procurements.**

For Architectural, Engineering and other Construction-Related Professional Services, BART depends heavily on On-call contracts. These are indefinite quantity (IDIQs) cost plus-fixed fee contracts with a not-to-exceed limit. A select group of firms are awarded five-year contracts. These contracts impact DBE, SB and MWBE involvement, particularly at the sub-consultant levels, in the following ways:

- Inclusive procurement planning is limited because of the broad nature of the scope of work. As one staff member stated, if some services needed were removed from the larger scope, such as inspection services, they would have a better opportunity to include DBEs, SBs, and MWBEs.
- BART Sponsor Departments have a difficult time managing these contracts in an inclusive manner, because of the project management priority and the nature of the contract vehicle used. Once the On-call contract is awarded, often for a 5-year period, the involvement of the Procurement Department and OCR is limited. As such, BART's ability to support and encourage DBE, SB and MWBE participation is lessened.
- Because the contract award is essentially a budgetary limit, the actual negotiated scopes of work with an established cost are developed under Work Plans. Project managers, not the Procurement Department, are responsible for the development and negotiation of these Work Plans, and the selection of prime and sub-consultants that will perform these scopes of work. As such, the Sponsor Department has taken on responsibility for inclusion of DBEs, SBs and MWBEs in this contracting activity.

F. BART’s concerns on intervening into the prime/subcontractor relationship may provide an opening for prime contractor and consultant behavior inconsistent with the spirit and intent of laws and regulations regarding subcontractor substitution.

The issue of DBE, SB and MWBE substitution and BART’s perceived inability to address this issue has been identified by BART staff in all departments interviewed, as well as in anecdotal interviews with DBEs, SBs and MWBEs.

This perception that BART cannot control Subcontractor substitutions without piercing the veil of Contractor and Subcontractor agreements and relationships appears to manifest into the prime contractors’ ability to substitute subcontractors, regardless of its commitment within executed agreements.

It appears that the need to provide BART project managers with maximum flexibility to execute project work on schedule also impacts BART’s perspective on subcontractor substitution.

G. While BART’s General Manager has exhibited leadership in promoting DBE, SB and MWBE participation through race-neutral programmatic initiatives and community outreach, the effectiveness of these initiatives are reduced by the issues outlined above.

Based on interviews, to encourage greater DBE, SB and MWBE participation in BART procurement and contracting opportunities, the General Manager has requested OCR to develop and implement several race- and gender-neutral programmatic initiatives, with varying success. The effectiveness of these initiatives are impacted as described below:

- **Contracting Plans**—Contracting Plans are utilized primarily to identify opportunities that can be unbundled and to support goal setting. The Contracting Plans are an effort to create inclusive procurement planning, but are narrowed in their usefulness because of limited procurement planning overall and lack of full integration of the Contracting Plan into strategic procurement processes and project delivery schemes.
- **Unbundling**—Because of the decentralized process that causes the Procurement Department to act in more of an administrative role, and because unbundling has not been fully integrated into strategic procurement processes and project delivery schemes, unbundling is expanding workloads without proper human and infrastructure support to ensure successful outcomes from the unbundling process.

- **Small Business Technical Assistance Program, including Bonding Support**—These programmatic initiatives will not achieve maximum capability until BART creates pre- and post-award processes that fully support inclusive and strategic procurement and project-delivery schemes. In fact, the bonding assistance component of the Small Business Program has been discontinued, due to lack of participation.
- **Small and Micro-Business Set-asides**—Lack of consistent notice issues, reduced competition and favoritism may be impacting DBE, SB and MWBE participation in small- and micro-business set-asides. Staff highlighted the difficulties in securing participation of DBE, SB and MWBE on small and micro-business set-asides. M³ Consulting was unable to ascertain from these interviews whether the lack of participation was due to lack of vendor availability and capacity, lack of vendor interest or lack of sufficient notice of opportunity at BART.
- **Review of DBE, SB and MWBE Participation on Informal Procurement Opportunities**—This analysis is underway at BART. As such, M³ Consulting does not have BART observations regarding the outcomes of its analysis. M³ Consulting has conducted a similar analysis in its Threshold Analysis. See Chapter 6: Utilization Analysis for results.

3.6 CONCLUSIONS

In conclusion, M³ Consulting reiterates the execution and implementation of a public entity's community economic development objectives commences with the procurement process. Public entity achievement of its community economic development objectives through procurement begins with a public policy approach to procurement and community economic development, supported by project execution, as opposed to purely employing a cost, schedule, and project efficiency based approach.

BART has a guiding Mission Statement, a reasonable overall organizational structure and a number of reasonable policies and procedures in place. It has also implemented (or partially implemented) many of the Best Practices found in the procurement industry for large institutions. However, BART also has a number of areas in its policies, procedures and practices that may create barriers to the ability of DBEs, SBs and MWBEs to participate in BART's contracting and procurement opportunities. If these areas are not appropriately addressed, there is a risk of inherent, unintentional and/or intentional exclusionary and/or discriminatory practices in BART's procurement program.

CHAPTER 4: STATISTICAL METHODOLOGY

4.1 INTRODUCTION

This chapter discusses the statistical methodology employed by M³ Consulting in the San Francisco Bay Area Rapid Transit District (BART) Disparity Study in two parts:

- 4.2 Statistical Methodology**—The first part is a conceptual discussion of the statistical methodology for analysis of minority, woman and disadvantaged-owned business enterprises (M/W/DBEs).
- 4.3 Data Sources Utilized in Statistical Analysis for BART**—The second part is a discussion of data sources, data collection procedures, data gaps and implications of the gaps on the statistical analysis for BART.

4.2 STATISTICAL METHODOLOGY

The statistical methodology discusses availability, utilization, and disparity. It includes a presentation of the two types of availability: “*actual availability*” and “*potential availability*”; various definitions of availability; and M³ Consulting’s “*Ready, Willing and Able*” (*RWASM*) model. M³ Consulting has adapted this model to the specific BART data sources available for this study. Also discussed are the types of utilization analysis that will be performed. The statistical methodology section concludes by defining the disparity ratio and significance tests, crucial for drawing conclusions regarding any disparity in BART’s recent history of contracting with M/W/DBEs.

4.2.1 DISPARATE IMPACT ANALYSIS

The statistical analysis conducted in this Disparity Study is a key component of the Disparate Impact Analysis to determine if there is any discrimination against M/W/DBEs by a public entity. Under a *Crosby* Disparate Impact Analysis, a public entity may be involved in “active discrimination”, which is caused by its own direct action, or “passive discrimination” which involves participating in the discriminatory or exclusive actions of other agents in the public and private sector.

Disparate Impact is defined as a policy or practice that, although neutral on its face, falls more harshly on a protected group. This impact may be viewed as discriminatory behavior in certain instances. The statistical analysis seeks to determine if there is any disparate impact of an agency’s policy(ies) or practice(s), intended or unintended, on protected classes.

In response to *Croson*, statistical methodologies related to the analysis of procurement and contracting policies and practices continue to evolve as litigation occurs. Because the legal cases are fact-specific and the courts can only review evidence put before them, it is useful to review *Croson* statistical methodologies against the well-tested and even more extensively litigated disparate impact analysis established under EEO law, from which the disparate impact and disparate treatment tests and analysis evolved. The comparison will reveal the course that the two-disparate impact analysis have taken.

- EEO Disparate Impact Analysis requires a deeper analysis and testing of an institution's specific EEO policies, procedures and practices, with emphasis on active participation in discrimination;
- *Croson* Disparate Impact Analysis is moving toward broader analysis, with ever increased focus on passive participation, as opposed to active participation in discrimination, therefore with a lesser focus on the actual decision-making policies, procedures and practices of the public entity itself and its vendors.

M³ Consulting's statistical methodology includes an analysis of active and passive participation and the methodology is compared to the more evolved active participation requirements of EEO analysis.

A. Brief Overview of EEO Disparate Impact Analysis

A disparate impact analysis under EEO involves three distinct analyses. Below is a brief overview of the analysis, as stated in "The Role of Two Statistical Approaches in EEO Cases," and a comparison to methodologies deployed under *Croson* disparate impact analysis.

In the first burden of a disparate impact analysis, up to three tests are performed to determine adverse impact:

1. The "threshold" analysis (also called the initial inquiry) to see if gender and racial composition (i.e., percentages) of the at-issue job is underutilized compared to the composition of the qualified population in the relevant labor market;
2. A "barriers" analysis to see if there are barriers or practices which disproportionately deter gender or racial group members from applying; and,

3. The "selection" analysis to see if a practice, procedure or test is disproportionately impacting a gender or racial group, unless the practices, procedures or tests are not capable of separation for analysis, then the entire decision-making process can be evaluated as one practice.

If a practice, procedure, or test is found to be a "barrier" as defined above, an adverse impact finding could be expected on the cause of the barrier. However, even if the cause of the "barrier" to an at-issue job is not involved in the action, it still can be a "barrier" for statistical purposes. If a barrier is found, a binomial statistical test will be needed in the "selection" analysis and a "proxy" group will be needed in the "selection" analysis. If a barrier is not found (i.e., applicant flow is very similar to availability), then actual applicants can be used in the "selection" analysis and a hypergeometric statistic is used.³¹⁶

B. Threshold Analysis

Under a *Crosby* Analysis, the EEO threshold analysis is akin to a disparity analysis in contracting. A disparity ratio is computed by comparing available firms, as determined by ready, willing and able firms, to firms actually utilized by a public entity. This is an important inquiry that sets the stage to determine if there is cause for additional disparate impact analysis to determine if the inference of discrimination resulting from this analysis is remedial. As such, the methodology utilized for the computation of the pool of ready, willing and able firms takes on significant importance in disparity analysis. Under U.S. DOT 49 CFR Part 26, this threshold analysis could be considered Step 1: Baseline Availability. Five types of analysis are allowable under U.S. DOT 49 CFR Part 26:

³¹⁶ Richard E. Biddle, "The Role of Two Statistical Approaches in EEO Cases", 1995. See also 29 CFR Ch. XIV, Part 1607, §1607.17(2)

- Bidder list³¹⁷
- DBE Directories and Census Bureau Data
- Data from a Disparity Study
- Goal of Another DOT Recipient, if same or substantial similar market
- Alternative method

We further note that agencies utilizing bidder analysis must maintain bidder data consistent with 49 CFR Part 26.45³¹⁸.

While relying on a threshold-type analysis appears straight-forward, under *Croson* analysis, it is not, principally due to the issues of willingness and qualifications of the firms in question. Firms in the general marketplace may or may not meet the ready, willing and able requirements established under 49 CFR Part 26. Firms in the marketplace may be ready, but not willing and/or able.

As it relates to Marketplace availability, firms may not be “able”, despite efforts to refine the Marketplace or Custom Census availability to firms in NAICS or NIGP codes representing goods and services procured by the public entity. Regressions and capacity analysis not conducted on the pool of firms bidding with or award contracts by the public entity indirectly provides some indication of capacity, but does not directly relate to the individual firm’s qualifications or to the determinations of firm’s qualification by the public entity during the bidding process. Relying solely on Marketplace availability does not adequately reveal a pool of firms that are “ready, willing and able” to do business with BART. Thus, a comparison of Marketplace availability to BART utilization does not conclusively reveal if BART and its prime vendors’ “policies or practices” are impacting prime and subcontractor selection.

In *Croson* disparity analysis, many consultants forego any consideration of bidder data and simply establish a basis for race and gender-conscious goals on disparity from Marketplace

³¹⁷ “The Department is retaining the bidders list as one of the approaches recipients may use to establish the annual overall DBE participation goal. To be acceptable, the bidders list must conform to the elements that we finalize in this final rule by capturing the data that identifies the firms that bid or quote on federally assisted contracts. This includes successful and unsuccessful prime contractors, subcontractors, suppliers, truckers, other service providers, etc. that are interested in competing for contract work. Recipients that use this method must demonstrate and document to the satisfaction of the concerned operating administration the mechanism used to capture and compile the bidders list. If the bidders list does not capture all available firms that bid or quote, it must be used in combination with other data sources to ensure that it meets the standard in the existing regulations that applies to alternative methods used to derive a base figure for the DBE availability estimate.” Federal Register, Final Rule, 49 CFR Part 25, Department of Transportation, October 2, 2014.

³¹⁸ The public agency is most likely to secure the required information during the bid process when there is a consequence to the bidder/sub-bidder for non-compliance. Often, in surveying for financial information, even for ranges, responders answer financial questions less often than all other questions. In the sparsely populated capacity data provided by BART, several firms declined to provide the requested financial data.

or Custom Census Availability, for DBE programs, adjusted under Step 2 of the U.S. DOT's availability analysis.

The U.S. Supreme Court has shown increasing impatience with this lack of specificity in disparate impact analysis. It is worth repeating here, from the legal chapter, the Court's most recent opinion regarding disparate impact claims in the June 2015 U.S. Supreme Court case, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.³¹⁹ In upholding the applicability of the disparate impact liability to the Fair Housing Act,

In a similar vein, a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. v. Antonio*, 490 U. S. 642, 653 (1989), superseded by statute on other grounds, 42 U. S. C. §2000e-2(k).³²⁰

...Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities, rather than solely "remov[ing] . . . artificial, arbitrary, and unnecessary barriers." *Griggs*, 401 U. S., at 431. And that, in turn, would set our Nation back in its quest to reduce the salience of race in our social and economic system.³²¹

The U.S. Supreme Court's analysis is applicable to the current state of most disparity analysis. However, under EEO, this type of analysis is not normally used for the establishment of race- and gender-conscious EEO goals. The barrier analysis and selection analysis are usually performed prior to that determination.

³¹⁹ No. 13-1371, 576 U. S. (2015)

³²⁰ Slip Op., at 19-20.

³²¹ Slip Op., at 22.

C. Barrier Analysis

A barrier analysis, using the EEO definition, would result in a comparison between M³ Consulting's Marketplace Analysis and M³ Consulting's RWASM analysis. This analysis may also be akin to the elusive "but-for discrimination" analysis pursued and attempted under *Croson* analysis. While the barrier analysis computation is simple, interpreting the causes of any differences is quite complex.

For example, RWASM Availability often yields higher percentages or proportions of availability than a Marketplace or Custom Census analysis. The differences may be caused simply by the differences in the two sample sizes. For BART, if Dun & Bradstreet were used for Marketplace Analysis, the pool would contain 15.44 percent MWBEs of a total of 46,288 firms after refining the sample to extract relevant NAICS codes and limiting it to the relevant market; the BART bidder pool (inclusive of awardees for which bid data was not available) consists of 12.24 percent certified M/W/DBEs or 17.72 percent certified M/W/DBEs + D&B MWBEs of 3,963 firms in comparison.

Some argue that the cause for larger RWASM availability measures could be the impact of race- and gender-conscious programs on the bidder pool. However, in some instances, public entities with mature race- and gender-conscious programs have actually discouraged M/W/DBE bidders due to the continuous and repeated use of the same vendors or continued discriminatory policies and practices, even in light of the existence of race- and gender-conscious goals.³²² M/W/DBE bidders often view this type of procurement environment as a "closed-shop."

Alternatively, M/W/DBEs often pursue opportunities in the public sector, because public entities are often seen as more inclusive, based on their mission and their diverse make-up of political representatives, and not simply the presence of race- and gender-conscious goals. In reviewing building permits data from the City and County of San Francisco, Non-M/W/DBEs were selected at the Prime Level by both Private and Public Sector Owners at almost 98 percent based on dollar values on over reported 100,000 opportunities. Even on Private and Public Sector opportunities below \$100,000, where capacity should not be an issue, Private and Public Sector owners still selected Non-M/W/DBEs about 95 percent of the time. The issue of exclusionary behavior toward subcontractors amongst construction firms was apparently to such a degree that the California legislature passed Public Contract Code 4100-4114, "Subletting and Subcontracting Fair Practices Act".

³²² In response to the *Western Paving* case, DOT appears to have addressed this concern by stating that "the study should not rely on numbers that may have been inflated by race-conscious programs that *may not have been narrowly tailored*." Emphasis added. See Chapter II: Legal Analysis, p. 2-29.

Additionally, after the Recession of 2008, many large private sector firms around the country, including those who rarely worked in the public sector, turned to the public sector for opportunities, pushing many M/W/DBEs out of contention for opportunities in the competitive bidding process.

As such, findings from a barrier analysis under *Croson* would necessitate a **deep dive** into the public entity's procurement operation and selection processes to determine whether the barriers are caused by internal or external factors or active vs. passive discrimination. This deep dive also encompasses the public entity's prime vendors who select sub-vendors to participate on the public entity's opportunities. This deep dive into the procurement and contracting activity of prime vendors is a direct means of measuring "passive participation" in private sector discrimination.³²³ In light of Public Contract Code 4100-4114, this deep dive takes on even greater importance in the California marketplace. Under 49 CFR Part 26, a barrier analysis is somewhat anticipated under Step 2: Adjusted Baseline Availability.

D. Selection Analysis

M³ Consulting's RWASM Availability analysis, a primarily bidder-based analysis, is most akin to the Selection Analysis under EEO, established to determine if the public entity's policies and procedures are producing any noted disparity. M³ Consulting draws conclusions of disparity that the public entity may need to address through race- and gender-conscious goals from this analysis, not its Marketplace Analysis. In the EEO environment, if disparity is found under the Selection Analysis and an employer:

"...has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex, or ethnic "conscious," include, but are not limited to, the following: (a) the establishment of a long-term, and short-range, interim goals and timetables for specific job-classifications, all of which should take into account the availability of basically qualified persons in the relevant job market..."

While some would argue that Marketplace or Custom Census represents a proxy group under a Selection Analysis for incomplete bidder data or bidder data impacted by discrimination, these firms do not meet the ready, willing and able definition. Furthermore, Marketplace

³²³ BART attempts to ensure that it is not engaged in this type of discrimination through its non-discrimination program. However, the California Supreme Court appears to have negatively impacted public entity's ability to do so proactively in *Hi-Voltage II*, thus further necessitating this deeper dive to address the definitions established by the court.

Availability can also be impacted by discrimination and exclusion, particularly in the construction industry and as reflected under Public Contract Code 4100-4114 and the findings of the Building Permits analysis. M³ Consulting's RWASM Availability Model, discussed supra, is a cascading model, designed to be extended beyond ready, willing and able firms (actual availability) only when necessary. If earlier levels were deemed completely unreliable, prior to moving to Marketplace Availability augmented by DBE lists (firms that are "ready"), M³ Consulting would focus on a public entity's vendor registration list augmented by DBE lists (firms that are "ready and willing."). U.S. DOT seeks to address this issue through Step 2: Adjusted Baseline Availability.

Further, when calculating a disparity ratio using RWASM Availability, M³ Consulting is using Actual Utilization compared to Actual Availability. If Potential Availability is utilized instead of Actual Availability, the resulting disparity ratio assumes that, if outreach was done, more available firms would actually be included in Actual Availability. This could be akin to "but-for-discrimination", but it could also be "but-for-outreach" and have nothing to do with discrimination. Furthermore, it is possible that they were not included purely due to random chance, which is the essence of the significance tests.

Given that M³ Consulting computes disparity based on RWASM Availability (actual availability reflecting BART's selection process), if disparity is found using RWASM Availability, in light of both federal requirements and Proposition 209, BART's legal staff would then determine if BART **may or must** utilize race- and gender-conscious goals to remedy this disparity.³²⁴

4.2.2 RELEVANT MARKET MEASUREMENTS

The *Croson* statistical analysis begins with the identification of the relevant market. The relevant market establishes geographical limits to the calculation of M/W/DBE availability and utilization. Most courts and disparity study consultants characterize the relevant market as the geographical area encompassing most of a public entity's commercial activity. The *Croson* Court required that an MBE program cover only those groups that have actually been affected by discrimination within the public entity's jurisdiction.³²⁵

³²⁴ See discussion of *Coral Construction, Inc. v. City and County of San Francisco (San Francisco II)* in Chapter II: Legal Analysis, p. 2-34. The court stated that "[w]hile the parties have not brought to our attention any decision ordering a governmental entity to adopt race-conscious public contracting policies under the compulsion of the federal equal protection clause, the relevant decisions hold open the possibility that race-conscious measures might be required as a remedy for purposeful discrimination in public contracting."

³²⁵ *Richmond v. Croson*, at 725.

Two methods of establishing the relevant market area have been used in disparity studies. The first utilizes vendor and contract awardee location of dollars expended by an entity in the relevant industry categories. In the second method, vendors and contractors from an entity's vendor or bidder list are surveyed to determine their location. The former is based on approaches implemented under the U.S. Justice Department guidelines for defining relevant geographic markets in antitrust and merger cases. M³ Consulting has developed an alternative method for determining an entity's relevant market by combining the above methods and using an entity's bidder lists, vendor lists, and awardee lists as the basic foundation for market definition.

By examining the locations of bidders, vendors, and winners of contract awards, M³ Consulting seeks to determine the area containing a preponderance of commercial activity pertaining to an entity's contracting activity. While case law does not indicate a specific minimum percentage of vendors, bidders, or contract awardees that a relevant market must contain, M³ Consulting has determined a reasonable threshold is somewhere around 70 percent, each, for bidders, vendors, and contract award winners. Further analysis may be necessary if there are "large" differences in the percentages of these three measures.

4.2.3 AVAILABILITY ANALYSIS

The fundamental comparison to be made in disparity studies is between firms owned by minorities and/or women ("MWBEs") and other firms ("non-MWBEs") *ready, willing and able* to perform a particular service (i.e., are "available"), and the number of such businesses actually being utilized by the locality or its prime contractors. This section presents a discussion of the availability estimates for M/W/DBEs who are *ready, willing and able* to perform work on contracts for BART.

Availability is the most problematic aspect of the statistical analysis of disparity. It is intrinsically difficult to estimate the number of businesses in the marketplace that are ready, willing and able to perform contracts for or provide services to a particular public entity. In addition to determining an accurate head count of firms, the concomitant issues of capacity, qualification, willingness, and ability complicate the production of accurate availability estimates.

A. Miller³ Consulting, Inc. Availability Model

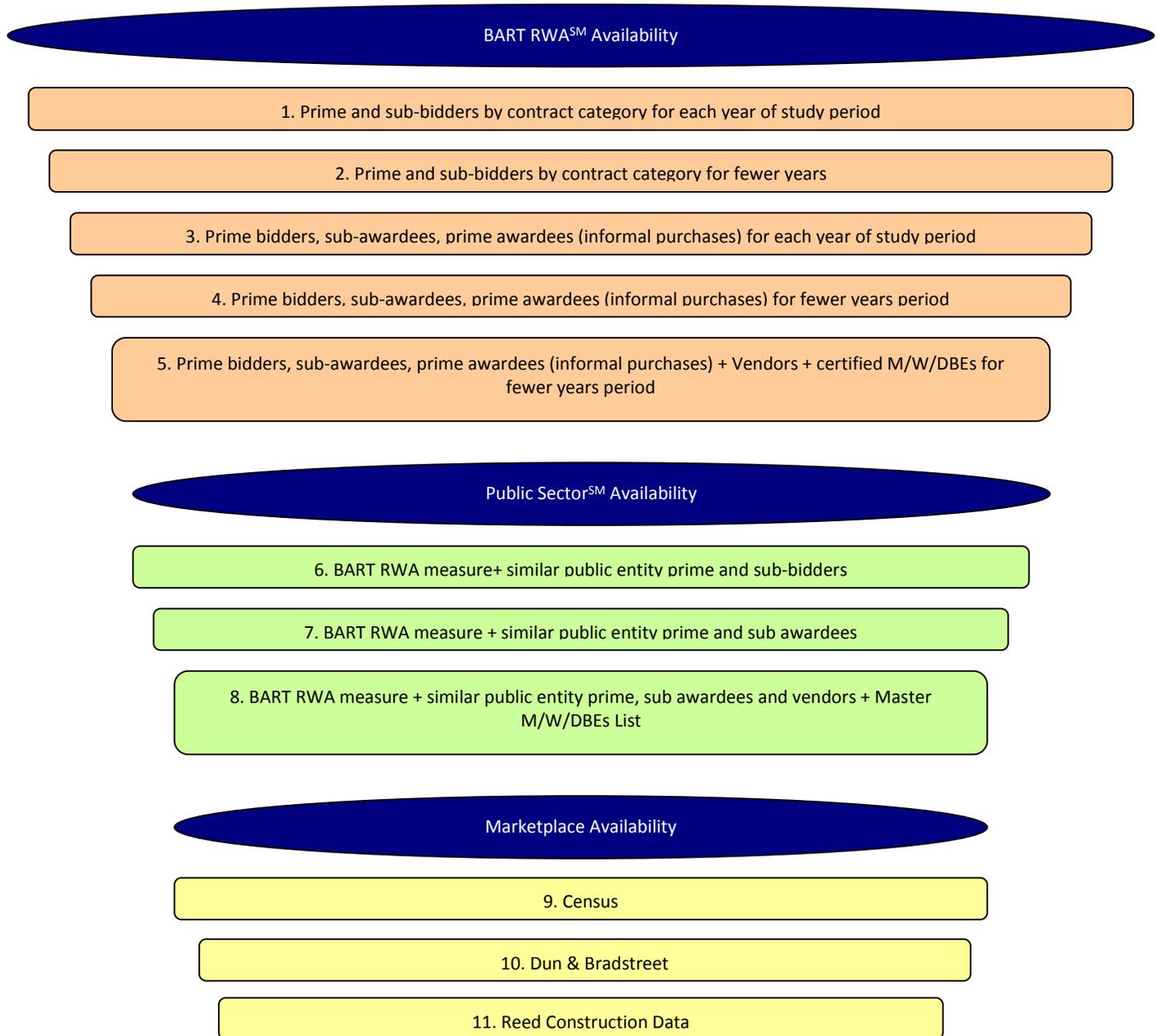
M³ Consulting employs two general approaches to measuring availability: the Ready, Willing and Able (RWASM) Model, and Marketplace Availability. In summary, the Availability measures can fall into the following categories:

- **RWASM Availability**—Those firms who are ready, willing and able to do business with BART;
- **Public Sector Availability**—Those firms who are ready, willing and able to do business with similar public sector agencies within BART’s marketplace³²⁶; and,
- **Marketplace Availability**—All firms’ available in BART’s marketplace, as measured by Dun & Bradstreet and Reed Construction.

The Availability matrix below in Figure 4.1 outlines M³ Consulting’s Availability Model. The matrix starts with the optimum availability measure of those firms “ready, willing and able” to do business with BART and cascades down to less optimum measures. Factors that determine which level of availability best suits BART’s environment include quality of available data, legal environment, and previous levels of inclusion of M/W/DBE in bidding and contracting activity.

³²⁶ This analysis requires inter-governmental cooperation between public entities providing bidder, vendor and awardee data, thus is not performed, unless such agreement is developed for individual agencies or a consortium of agencies conducted a consortium disparity study.

Figure 4.1
RWASM Availability Model



Source: M³ Consulting, Inc.

When refined to BART’s data, the RWASM Availability Model levels are defined as follows:

| Table 4.1 | |
|--|--|
| BART Specific RWASM Availability Levels | |
| RWASM Availability Level | RWASM Availability Definition |
| Level 1 | BART Bidders and Sub-bidders |
| Level 2 | BART Bidders and Sub-bidders + Informal and Non-competitive Awardees* |
| Level 3 | BART Bidders and Sub-bidders + Informal and Non-competitive Awardees + Prime/Subcontractors** |
| Level 4 | BART Bidders and Sub-bidders + Informal and Non-competitive Awardees + Prime/Subcontractors + Plan Holders and BART Vendors*** |

Source: M³ Consulting

*From PeopleSoft Financial Management System

**From PDC Work Plan Data and OCR VPTS. Only subcontractors reflecting payments were included.

***Typically, Vendors and Plan Holders, along with certified MWBEs would be reported separately. However, for BART, Vendors and Plan Holders are not of sufficient size for this analysis, in comparison to the Master S/M/W/DBE list.

B. Ready, Willing and Able (RWASM) Model³²⁷

The concept of the “*Ready, Willing and Able*” (RWASM) estimate model is derived from the U.S. Supreme Court’s statement that:

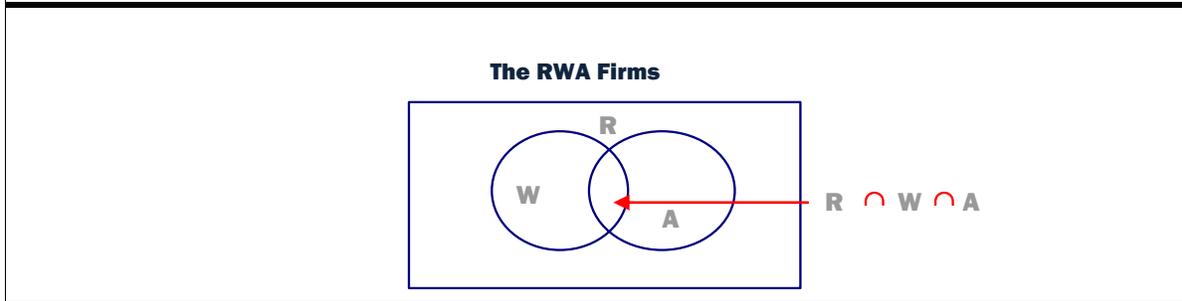
Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.³²⁸

The basic assumption underpinning RWASM estimates is that a business must exist and actively seek to do business with a particular entity, and have the capacity to perform contracts of the types that BART awards, in order to be included in the pool of businesses “actually available” to perform on the entity’s contracts. The M³ Consulting RWASM estimate is illustrated in Figure 4.2.

³²⁷ M³ Consulting developed the RWASM model in 1992.

³²⁸ *City of Richmond v. J.A. Croson*, 109 S.Ct. 706, at 729 (1989).

Figure 4.2
RWASM Availability Estimate Venn Diagram



Source: M³ Consulting, Inc.

The first component of the model, “*ready*”, simply means a business exists in the market area. The second component, “*willing*”, suggests a business understands the requirements of the work being requested, and wants to perform the work. The third component, “*able*”, defines the group of firms with capacity to do the job.

Readiness

“*Readiness*”, as used in BART’s Disparity Study, is an indication that a firm is present in the market area studied. M³ Consulting uses Dun & Bradstreet (D&B) estimates of the number of firms in a particular area to measure firms “*ready*” to do business with BART.³²⁹

Willingness

“*Willingness*” to engage in procurement opportunities with a public entity, as understood for purposes of this study, is a concept that cannot be observed directly, but must be inferred through volitional behavior on the part of a firm. It is possible that not all existing (ready) firms want to contract in the public sector, in general and with BART, in particular. The “*willing*” requirement reduces the D&B estimate to the number of firms interested in doing business with BART, as discussed later in this chapter. Willingness can be affected greatly by the particular type of service area under which a potential project may be classified, the general level of market demand, previous contracting and management practices utilized by a contracting entity, legal and other administrative requirements that must be adhered to, as well as other factors.

³²⁹M³ Consulting previously relied upon U.S. Census Bureau estimates, however, as of this year; this data is no longer reported by Census.

Ability

The third component, “*able*”, defines the group of firms with the capacity to perform the tasks necessary to complete the job. The “*able*” requirement further reduces the number of firms available to do business with an entity. “*Ability*”, as used in this study, is synonymous with “capacity,” and refers to the measure of additional work a firm can take on at a given point in time.³³⁰ Ability is only imperfectly observable directly, and must also largely be inferred through external proxies such as number of employees, size of past revenues, and number of years in business. A firm may have the “ability” to perform a contract:

- Either because it already has the staff and resources to perform the work,
- Or because it can readily hire sufficient staff and acquire sufficient resources for that purpose.

Parties who are seeking to explain what the Supreme Court meant usually raise the capacity issue of qualified minorities. In *Concrete Works v. Denver Fd. 823 F. Supp. 821 (D.Colo.1993)*, the Colorado district court reviewed the challenged availability/utilization analysis submitted by the City and County of Denver. The Concrete Works Company challenged the use of availability measures and suggested that the appropriate standard was capacity. The court provided a lengthy discussion of the capacity arguments, stating that:

“Capacity is a function of many subjective, variable factors. Second, while one might assume size reflects capacity, it does not follow that smaller firms have less capacity; most firms have the ability and desire to expand to meet demand. A firm’s ability to break up a contract and subcontract its parts make capacity virtually meaningless.”³³¹

Interestingly, a BART procurement staff member interviewed similarly noted the elasticity of firm capacity, stating that capacity fluctuates amongst all contractors, and particularly small contractors. “There's times when things are really good and times when they're not. There's times when we seem to be pulling a lot of people here, and there's times when we're begging people to bid on this stuff. That's how it works. A lot of that does fluctuate to the economy. The companies that are still in business, these companies, they float in and out. Sometimes our requirements discourage a lot of contractors to bid it.”

³³⁰ The appropriate definition of capacity should be closely related to objective criteria used to determine qualifications, as discussed above. Ideally, one wants to identify and use “discrimination-free” measures of capacity in determining the pool of available firms.

³³¹ *Concrete Works v. Denver, 823 F. Supp. 821 (D.Colo.1993)*

In *Rothe Development Co. v. U.S. Department of Defense and the U.S. Department of the Air Force*, the Federal District Court found the most reliable way for accounting for firm size, without changing the disparity-ratio methodologies was to employ “regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it.”³³² Utilizing survey data, M³ Consulting conducts regression analysis to buttress its RWASM Availability and Disparity findings.

M³ Consulting’s RWASM model focuses on firms “actually available” to do business with BART. The overriding consideration for specifying availability estimates for BART’s disparity analysis is to include firms that have actively sought to contract or provide goods and services to BART. “Actual availability” refers to firms that have affirmatively shown interest in doing business with BART in one or more of the following ways: bidding for a BART contract; being awarded a BART contract; or, being included on BART’s vendor or plan holder’s list. Additionally, M³ Consulting’s RWASM methodology seeks to define similarly those DBEs, MBEs, WBEs, SBEs, and Non-M/W/DBEs to be included in the availability analysis.

The RWASM estimates define availability conservatively, and include only those firms that have presented themselves to BART as *ready, willing* and *able* to conduct the work requested by BART.

In the arena of BART contracting, based on available data, M³ Consulting conducted an RWASM availability analysis (*i.e.*, an analysis of “actual availability”) using lists of prime bidders, prime awardees, sub bidders and sub-awardees for FY 2011 - FY 2014.

C. Potential Availability calculations

In contrast to “actually available” firms, M³ Consulting also defines firms that may exist in the relevant market and may in the future express an interest in doing business with BART. Hence, we treat these firms as “potentially available.”

“Potential availability” refers to firms present in BART’s market beyond those “actually available,” to include those that have not bid on BART work or taken other affirmative steps toward doing business specifically with BART (as opposed to other public and private sector clients) during the study period.

M³ Consulting discusses two types of “potential availability”—“public sector availability”³³³ and “marketplace availability.” These measures may be used as benchmarks in setting

³³² 2008-1017, Federal Circuit at 36.

³³³ M³ Consulting developed the “Public Sector Availability” Model in 2006.

targets or in developing outreach initiatives in order to encourage firms to come forward and express an interest in BART contracting opportunities. M³ Consulting primarily focuses on Marketplace Availability because of the limitations of Public Sector Availability.³³⁴

1. ***Public Sector AvailabilitySM*** – Includes lists of available firms known to various public sector agencies, including, but not limited to, BART in the relevant market region. These firms are closer to RWASM, having expressed an interest in contracting opportunities with other public sector agencies with similar standards and limitations as BART. This availability measure includes a compilation of:
 - a. Lists of public agencies’ bidders, vendors and awardees; and,
 - b. List of S/M/W/DBEs certified by other public agencies.
2. ***Marketplace Availability*** – Including these firms in the availability measure expresses the ‘universe’ of all firms in the relevant market. These firms may or may not be considered RWASM. The lists that represent this availability measure are:
 - a. Census Data
 - b. Dun & Bradstreet Data
 - c. Reed Construction Data

1. U.S. Census Bureau Potential Availability Data

Measures of “potential availability” may be found in data provided by the Bureau of the Census. The standard source of evidence for firms owned by minorities and women is the 2007 Economic Census – Survey of Business Owners (SBO), Survey of Minority-Owned Business Enterprises (SMOBE) and Survey of Women-Owned Businesses (SWOB). Corresponding census data on non-minority-owned-firms have been calculated by subtracting the number of MWBEs from either the count of total business establishments in the Bureau of the Census’ *County Business Patterns* or from the unpublished counts of all firms measured in the business census data.

M³ Consulting typically develops census-based availability estimates using data provided by the Bureau of the Census (U.S. Census Bureau). The U.S. Census Bureau estimates are

³³⁴ Public Sector Availability requires intergovernmental cooperation, thus M³ Consulting performs this analysis only upon the request of the client and the proper implementation of appropriate agreements among affected public entities.

determined by firms with paid employees, which are a more conservative estimate of availability than the set of total firms (*i.e.*, including firms without employees) and ensures a better baseline level of firm capacity in comparison to an analysis based upon a total of all U.S. Census Bureau firms. The Census database utilized is the SBO Survey is broken down by category descriptions into the appropriate industry. Census SMOBE and SWOB 1997 was replaced for Census Survey of Business Owners (SBO) in 2002. The North American Industry Classification System (NAICSS) determined census SBO. The SBO covered 20 NAICSS' industries. The 2012 SBO data by race/gender was made available after submission of the Draft Final Report, as such M³ Consulting will not report Census availability.

2. Dun & Bradstreet (D&B) Potential Availability Data

In lieu of Census SBO data, Dun & Bradstreet (D&B) is a good alternate source of micro-business data. M³ Consulting analyzes this data set as a potential availability measure that reflects all businesses, inclusive of micro-businesses in the 9-county San Francisco Bay Area. The D&B data includes capacity data, such as average sales revenues and average full-time employees.

Both the U.S. Census Bureau and D&B lists have been compiled through statistically significant survey techniques conducted by the U.S. Census Bureau and Dun and Bradstreet, Inc., respectively. As such, these lists include the “universe” of firms in the San Francisco Bay Area potentially available to do business with BART and are statistically reliable. As discussed below under Section 4.3 - Data Sources, D&B utilizes three sources of data to identify MWBEs in its databases: government certified list (certified), non-certified list collected from membership organizations, directories and D&B calls (collected), and finally certified and collected records that have been confirmed by D&B call center campaigns (verified).

3. Reed Elsevier Availability Data

In addition to these two lists, Reed Elsevier publishes construction activity data across the country that includes construction projects in the planning phase, with the information on the owner of the project, description, value and location of the project. If the project goes to fruition, the general contractor, subcontractors and the architect and engineer that bid are listed with the projects, thus creating an additional list of ‘potentially available’ firms. This analysis is included in Chapter X: Private Sector Analysis.

4. Other Lists

Other lists, such as certification lists, chamber of commerce lists, and licensing lists are often not compiled by any statistical technique and are not reliable in the accuracy of the information presented. Therefore, M³ Consulting does not rely upon these lists for availability measurement. The information provided, however, can be used to identify the race and gender of available firms.

5. “Actual Availability” vs. “Potential Availability”

In summary, the difference between “*actual availability*” and “*potential availability*” may help identify and narrow down the area of availability that may be affected by discrimination, lack of outreach, lack of interest, lack of specific expertise required by the public entity, and lack of capacity. See also Barriers Analysis (page 6) above.

4.2.4 UTILIZATION ANALYSIS

A. Numbers of Contracts, Dollar Value of Contracts or Numbers of Firms

Utilization represents the contracting and subcontracting history of Non-M/W/DBEs and M/W/DBEs with BART. In developing the contract database to be used as the basis for determining utilization, there are three alternative measures of utilization that can be taken in each procurement category. These are:

1. The numbers of contracts awarded;
2. The dollar value of contracts received; and,
3. The raw numbers of firms receiving contracts.

The current report presents two of the three measures of utilization: the number of contracts awarded and the dollar value of the contract awards. Both dollars and counts are reported in order to determine if there are any outliers or large single contracts that cause utilization dollar values to be at reported levels. These were preferred over the third measure—the number of firms, which is less exact and more sensitive to errors in measurement.

For instance, if a single firm, owned by a Non-M/W/DBE, received 30 contracts for \$5 million, and ten African American-owned firms received one contract each worth \$100,000, measured by the number of firms, African American-owned firms would appear to be over utilized, and Non-M/W/DBEs underutilized. Using the number of contracts and the dollar value of

contracts awarded, the aforementioned result would reverse (depending on relative availability).

M³ Consulting's position with regard to percentage estimates of utilization, by the dollar value of contracts and number of contracts, is that discrimination would be more likely to affect the dollars awarded than the number of contracts awarded to M/W/DBEs or the number of M/W/DBEs utilized, particularly if there are stereotypical attitudes that M/W/DBEs cannot handle larger contracts, and the largest volume of contracts awarded are smaller contracts.

B. Prime Contracting and Subcontracting

Because prime contractors, especially in Construction, Construction-related Professional Services and Architecture and Engineering, often subcontract work to other contractors/consultants and because the utilization of M/W/DBEs in the absence of a set-aside or goal provision usually occurs at the subcontract level, assembling data on subcontract work is critical to utilization analysis.

In the area of Construction and Architecture and Engineering contracting, the standard presentation of utilization data by M³ Consulting is to show Total "Pure Prime + Subcontractor" utilization and Subcontractor utilization in separate tables, if data allows. "Pure prime utilization" based on dollar value of contracts is defined here differently from "prime contract award value" due to the necessity to avoid double-counting of subcontract awards when examining subcontractor utilization. "Pure prime utilization" is correctly defined as the value of prime contracts *net of subcontract value*. This magnitude, when added to the value of subcontractor utilization, results in a correct measurement of "total" utilization, by the M/W/DBE category.

4.2.5 DISPARITY ANALYSIS

A. The Notion of Disparity: The Concept and Its Measurement

A straightforward approach to establishing statistical evidence of disparity between the availability of M/W/DBEs and the utilization of M/W/DBEs by BART is to compare the utilization *percentage* of M/W/DBEs with their availability *percentage* in the pool of total businesses in the relevant market area. M³ Consulting's specific approach, the "Disparity Ratio," consists of a ratio of the percentage of dollars spent with M/W/DBEs (utilization), to the percentage of those businesses in the market (availability).³³⁵

³³⁵See DJMA, A Fact Finding Study Prepared for the New York Metropolitan Transit Authority (January 1990).

Disparity ratios are calculated by actual availability measures. The following definitions are utilized in the M³ Consulting ratio:

| | | |
|----------------|---|---------------------------------------|
| A | = | Availability proportion or percentage |
| U | = | Utilization proportion or percentage |
| D | = | Disparity ratio |
| N _w | = | Number of women-owned firms |
| N _m | = | Number of minority-owned firms |
| N _t | = | Total number of firms |

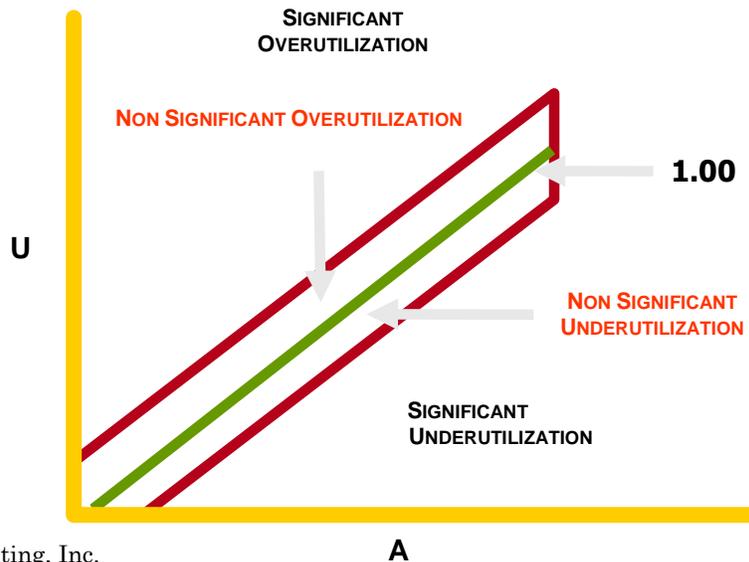
Availability (A) is calculated by dividing the number of minority and/or women-owned firms by the total number of firms. Utilization (U) is calculated by dividing total dollars expended with minority and women-owned firms by the total expenditures.³³⁶

$$\begin{aligned}A_w &= N_w / N_t \\A_m &= N_m / N_t \\D &= U / A\end{aligned}$$

When D=1, there is no disparity, (*i.e.*, utilization equals availability). As D approaches zero, the implication is that utilization is disproportionately low compared to availability. As D gets larger (and greater than one), utilization becomes disproportionately higher compared to availability. Statistical tests are used to determine whether the difference between the actual value of D and 1 are statistically significant, (*i.e.*, whether it can be stated with confidence that the difference in values is not due to chance (see Figure 4.3).

³³⁶ Alternative utilization measures based on numbers of firms and numbers of contracts can be calculated in a similar fashion.

Figure 4.3
Disparity Ratio Indicating Areas of Significant and Non-Significant Disparity and Overutilization



Source: M³ Consulting, Inc.

The statistical disparity ratio used in this study measures the difference between the proportion of available firms and the proportion of dollars those firms received. Therefore, as the proportion of contract dollars received becomes increasingly different than the proportion of available M/W/DBEs, an inference of discrimination can be made.

1. Statistical Significance

The concept of statistical significance as applied to disparity analysis is used to determine if the difference between the utilization and availability of M/W/DBEs could be attributed to chance. Significance testing often employs the t-distribution to measure the differences between the two proportions. The number of data points and the magnitude of the disparity affect the robustness of this test. The customary approach is to treat any variation greater than two standard deviations from what is expected as statistically significant.

A statistical significant outcome or result is one that is unlikely to have occurred as the result of random chance alone. The greater the statistical significance, the smaller the probability that it resulted from random chance alone. P-value is a standard measure used to represent the level of statistical significance. It states the numerical probability that the stated relationship is due to chance alone. For example, a p-value of 0.05 or 5 percent indicates that the chance a given statistical difference is due purely to chance is 1 in 20.

2. Practical Significance

The concept of statistical significance should not be confused with practical significance. According to Mansfield, even if there is a statistically significant difference between a sample value and a postulated value of a parameter, the difference may not really matter.³³⁷ This means disparities not statistically significant are not necessarily caused by chance. It also means that chance cannot be ruled out as a cause.

The most commonly used practical significance measure in the EEO context is the 4/5th or 80 percent rule, which indicates how large or small a given disparity is. An index less than 100 percent indicates that a given group is being utilized less than would be expected based on its availability, and courts have adopted the Equal Employment Opportunity Commission's "80 percent" rule, that is, that a ratio less than 80 percent presents a prima facie case of discrimination³³⁸.

Under the EEOC's "four-fifths" rule, a disparity ratio is substantively significant if it is 0.8 or less on a scale of 0 to 1 or 80 or less on a scale of 1 to 100 (i.e., Group A selection rate divided by Group B selection rate). Codified in the Uniform Guidelines on Employee Selection Procedures (UGESP, section 4D), the rule is described as follows:

"A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms and where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant."

³³⁷ Mansfield, Edwin, Statistics for Business and Economics, p. 322. Two standard deviations imply 95 percent confidence level which is the norm of the courts.

³³⁸ Engineering Contractors II, 122 F3d at 914; see 29 C.F.R. § 1607.4(D) ("A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.")

Thus, the 4/5th rule is a measure of the size of the disparity, but may need to be interpreted in light of particular context (e.g., sample size, in combination with statistical significance testing). However, case law suggests that the 4/5th rule can be interpreted as adequate stand-alone evidence in some situations, although it is unclear exactly what circumstances warrant such interpretation. The 80 percent rule is a general rule, and other factors such as statistical significance, sample size, discouraged applicants, etc., should be analyzed. The rationale for combining practical and statistical significance results is an intuitive one. In situations where the measures come to identical conclusions, the analyst can usually feel very confident in a finding of meaningful impact or no impact. In other situations, context may play an important role when statistical and practical significance measures produce different conclusions (i.e., when a standard deviation analysis is greater than 2.0 but the 4/5th rule is not violated)³³⁹.

4.3 DATA SOURCES UTILIZED FOR STATISTICAL ANALYSIS FOR BART

In order to conduct the statistical analysis, M³ Consulting collected and analyzed data from BART for the period covering FY 2011 through FY 2014. This section discusses the degree of completeness of the data source, data sources used, and the data collection process including the issues M³ Consulting encountered with these data sources. For this disparity study, BART provided data for analysis from both electronic and hard-copy files.

Because of data concerns, M³ Consulting sought to verify data provided, to the degree possible, within the time constraints of the study. Under employment discrimination law, a finding of adverse impact and inference of discrimination may be issued, if data is not maintained in formats that allow for on-going analysis of decisions made that may be impacted by race, gender, or ethnicity.³⁴⁰ The question remains if a similar holding of adverse impact and inference of discrimination, based on poor data tracking systems or lack of data required for disparity analysis, may be issued under a *Croson* analysis. This question should be viewed with the understanding that BART has a mature DBE program in existence for over 32 years, has conducted three disparity studies, and recently, under a federal audit of employment policies, was found not in compliance with Davis-Bacon requirements that have led to a loss of federal dollars. BART's IT Department, as noted in staff anecdotal comments Chapter III: Procurement Analysis, states that BART is about two years away from being able to report on M/W/DBE participation on an on-going real-time basis.

³³⁹ See Tables 1 and 2 that explain this in, "A Consideration of Practical Significance in Adverse Impact Analysis," Eric M. Dunleavy, July 2010, <http://dciconsult.com/whitepapers/PracSig.pdf>

³⁴⁰ 29 CFR §1607.4.D.—"Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force."

While BART tracks data by Construction, Professional Services, Procurement and Other Services, M³ Consulting separated A&E and Construction Management from the overall Professional Services category. Given BART's project-focus and the utilization of federal funds primarily on Construction and A&E procurements, M³ Consulting sought to provide BART with a clear understanding of the utilization of M/W/DBEs in these two categories.

4.3.1 DATA SOURCES FOR RELEVANT MARKET

In calculating relevant market, M³ Consulting sought to determine where about 70 percent of firms were located. We utilized the following market areas by procurement type to determine inclusively where the bulk of commercial activity by BART occurs.

- San Francisco-Oakland-Hayward, CA MSA—consists of the following five counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo; This MSA is a subset of the San Francisco Bay Area;
- San Francisco Bay Area (Bay Area)— includes the MSA and consists of the following nine counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo, Solana, Napa, Santa Clara, Sonoma;
- San Jose-San Francisco-Oakland, CA (CSA)—the CSA which include the following twelve counties (Bay Area and 3 additional counties): Alameda, San Francisco, Contra Costa, Marin, San Mateo, Solana, Napa, Santa Clara, Sonoma, San Joaquin, Santa Cruz, San Benito;
- San Jose-San Francisco-Oakland, CA (CSA) and Sacramento County (CSA-Plus) - the CSA-Plus which include the CSA plus Sacramento County.
- State of California
- Nationwide

Within these market areas, M³ Consulting determine the percentage of firms meeting the 70 percent threshold based on:

- Bidder and Awardees—Counts of bidders, sub-bidders, awardees and sub-awardees; and,
- PO and AP data—Dollar values and counts of PO and Payments.

While Vendors and Plan holders were considered, little weight was placed on these sources of data, as these firms do not meet the ready, willing and able definition.

4.3.2 DATA SOURCES FOR AVAILABILITY

A. RWASM Data Sources

1. Bidders

By bidding, firms demonstrate that they are “*ready*”, “*willing*” and assert that they are “*able*.” BART, in its bid review, ranking³⁴¹ and decision making process of responsive and responsible bidders determines “*ability*.”

In order to identify projects bid by BART, M³ Consulting queried BART regarding two potential sources of bidder data:

- Bidders and Sub-bidders on Formal Purchases; and,
- Quotes on Informal Purchases.

Like most public agencies, BART’s District Secretary maintains hard-copy bid tabulations and BART’s Procurement Department maintains hard copy records of bid and contract award data. Again, similar to many other public agencies, BART does not track quotes—written or verbal—on informal contracts.

BART’s Procurement Department provided a list of 275 contracts let between FY 2010- FY 2014, hereafter called the ‘Procurement List’. M³ Consulting relied on bidder and award information for the period of FY 2011- FY 2014 in order to view a time period comparable to the availability of reliable purchase order and payments data from the PeopleSoft financial system. Data from the GEAC financial system, utilized up to January 2011, was deemed unusable for this analysis. Additional discussion of the data from PeopleSoft and GEAC is discussed later in this chapter.

M³ Consulting initially assigned Procurement Types to the 275 formal contracts and submitted these assignments to BART’s Procurement Department for review and confirmation. The Procurement Department made appropriate adjustments to the

³⁴¹ While M³ Consulting did not analyze the ranking data, we note that OCR and Procurement maintain rankings of firms for those ranked 1st, 2nd and 3rd. On some contracts, the ranking was provided for all firms.

assignments based on BART's procurement policies and procedures and federal and state contracting laws.

Upon obtaining the corrections, M³ Consulting submitted the list to the Office of Civil Rights (OCR) for the collection of bidder and sub-bidder data.³⁴² M³ Consulting provided OCR a spreadsheet template with all necessary field headings to be completed by OCR in its collection of data from hard-copy files maintained in both OCR and the Procurement Department. The winning bidder, with its sub-bidders, was identified for each listed contract. The winning bidders were deemed to be "awardees." OCR noted that it did not begin to track specific sub-bidder scope of work data until 2013, and any available data, even then, would be sporadically captured.

The bidders and sub-bidders were cross-matched to the Master S/M/W/DBE file³⁴³ in order to identify the race, gender or ethnicity of firms. Further, to obtain procurement types for bidders and sub-bidders on the Procurement List contracts, M³ Consulting matched the Contract IDs on the Procurement List to the Contract IDs within the financial management data, thus extracting the United Nations Standard Products and Services Code (UNSPSC) code, a commodity code system, applied in BART's financial management system and assigned it to the Procurement List contracts. NAICS codes were then matched to the UNSPSC code. While bidders and sub-bidders were broken down by UNSPSC and NAICS codes, disparity ratios were not computed at this fine procurement code levels, as the data pools for both availability and utilization figures are too small for statistical significance testing.

2. Awardees

Awardees satisfy the same RWASM criteria as bidders. However, the availability pool is small because it only includes bidders that actually received an award. The awardees availability pool was determined using the awarded bidder in the contract awards data, as well as purchase order and accounts payable data. All firms awarded a contract were indicated by their representation on the Procurement List and in the financial system management system. The Procurement List represents formal contracts let by the Procurement Department.

All vendors to whom a payment is made against formal or informal contracts, are inherently considered awardees. All firms paid by BART were captured in the financial management system, which tracks purchase order commitments and payments. PeopleSoft data includes informal awardees and any formal contracts not represented on the Procurement List. M³

³⁴² BART determined in its RFP that it, not the consultant, would perform the task of data collection.

³⁴³ See discussion of Master SM/W/DBE List at p. 31.

Consulting requested the removal of all contracts awarded to non-commercial vendors (i.e. non-profits, governmental entities and employees). M³ Consulting also reviewed the contracts let by BART to ensure all non-commercial activity was excluded from the analysis.

M³ Consulting deemed the Purchase Order data in the financial management system as the most comprehensive source of firm award/commitment data at the formal and informal level. While Payments data is accurate, because of the nature of BART's multi-year construction and A&E contracts, it may undercount or over-count MWBE utilization. As such, M³ Consulting sought to identify both sub-bidder data from contract awards and sub-commitment data against Purchase Orders. M³ Consulting further reviewed OCR's Vendor Payment Tracking System and Work Plan data for sub-awardees, i.e., subcontractors receiving a payment, but not represented as a sub-bidder at contract award. These firms were added to the RWASM Availability pool.

3. Vendors and Plan Holders

Enrollment as a vendor is an additional criterion that may be used to measure availability. Companies included on the vendor list ("vendors") are a broader measure of availability than bidders and awardees. While vendors meet the "*ready*" and "*willing*" test, they may not be capable of performing on all projects. Similarly, plan holders meet the ready and willing test—firms that contact BART to request copies of construction plans to potentially bid. However, these are a less desired dataset to measure RWASM availability. Capacity proxies could be established if BART captured relevant data on its vendor registration application, which may be useful for future analysis.³⁴⁴

BART launched its online Vendor portal in January 2016. Prior to that time, BART did not maintain an official vendor list. Data provided for this analysis consisted of an unofficial vendor list, which represented the merging of mailing lists maintained by individual buyers/contract specialists in the Procurement Department. In calculating vendor availability, M³ Consulting normally conducts a separate availability analysis, using only vendors and certified M/W/DBEs, given that vendors meet the ready and willing component of RWASM. However, here, M³ Consulting merged vendors into the adjusted bidder/awardee data analysis at Level 4 availability, as these firms were ready and willing to do business with BART. M³ Consulting has not relied on these calculations in its analysis.

Similarly, the Plan holders list have been merged into the adjusted bidder/awardee data for analysis, producing Level 4 Availability.

³⁴⁴ DOT requires capacity proxies to be captured on bidder and sub-bidder data. We do note, that, firms, unless required as part of the bid evaluation process, do not tend to voluntarily provide financial data.

4. BART Certified Firms

BART maintains two certified lists: (1) certified MWBEs and (2) certified SBs. BART also relies on the Caltrans DBE list. While firms on certification lists meet the “*ready, willing and able*” criteria, the problem lies in the fact that only M/W/DBEs are subject to the certification process. While the certification listing is one measure of M/W/DBE availability, there is no such equivalent listing of Non-M/W/DBEs. Using the certification list alone to measure availability would cause bias in the availability measurement.

5. Master S/M/W/DBE List

M³ Consulting sought useable certified lists from public agencies in the Bay area. From agency responses, M³ Consulting created the Master S/M/W/DBE List for this study by combining agency certified lists from Caltrans, BART, and Alameda County.³⁴⁵

When using the Master S/M/W/DBE list to identify the race, ethnicity or gender of a business owner, for firms with multiple agency certifications, Caltrans DBE certification took precedence, followed by BART certification.

The following lists the information that was generated from the collected directories:

- Company Name
- Company Address (and City, State, Zip Code)
- Contact Name (when available)
- Company Telephone and Fax Numbers
- Ethnicity and gender of ownership
- Procurement Type (when available)
- Relevant Market Location
- Certifying Agency
- NAICS code

This Master SM/W/DBE List was then used to identify the race or gender of firm owners in other databases where such information was missing.

³⁴⁵Because of Proposition 209, several agencies now certify firms as SBE and others rely on Caltrans certification for contracts funded by federal dollars. Other agencies were not responsive to our request or did not maintain lists in useable formats. In addition to the agencies outlined above, agencies contacted included San Francisco Municipal Transportation Authority, City and County of San Francisco, City of Oakland, Contra Costa County.

B. Potential Availability Data Sources

1. U.S. Census Bureau SMOBE/SWOB Data

The U.S. Census Bureau conducts a Survey of Business Owners (SBO) in a five-year cycle. The most recently published data are the results of the 2012 survey which were released after M³ Consulting had submitted the Draft Final Report to BART. As such, M³ Consulting is not reporting Census Availability.

2. Dun & Bradstreet

Dun & Bradstreet (D&B) provided a customized list of firms from its Hoover's database for the San Francisco Bay Area. The Hoover's database consists of observations for 448,629 registered firms in San Francisco CMSA by SIC and NAICS code, and MBE and WBE status. When narrowed to NAICS codes relating to BART procurement activity, the number of firms was reduced to 46,288. D&B utilizes three sources of data to identify MWBEs in its databases: government certified list (certified); non-certified list collected from membership organizations, directories and D&B calls (collected); and finally certified and collected records that have been confirmed by D&B call center campaigns (verified). M³ Consulting removed SIC and NAICS codes that were not relevant to BART procurement activity, such as agriculture and mining. M³ Consulting sorted the SIC and NAICS codes into the categories of A&E, Construction, Other Services, Procurement and Professional Services, and then calculated Marketplace availability tables. The Hoover's database also provided data for these same firms on firm sales and employees. M³ Consulting utilized this data as a measure of firm capacity.

While D&B provides the most comprehensive private database of business listings in the U.S., it is not updated on a daily basis and so at any point in time, there may be some businesses that are not included, thus possibly undercounting the number of small businesses. In addition, Dun and Bradstreet (D&B) firms are listed for a fee.

Also, while D&B includes small and micro home-based businesses, these are difficult to identify and are thus somewhat less likely than other businesses to be included in D&B listings. A large number of small and micro, home-based businesses are more likely than large businesses to be minority- or women-owned, which suggests that MBE/WBEs might be underrepresented in the availability database.

3. Reed Construction Data

Reed Elsevier publishes construction activity data across the country and selected areas outside the United States. The data includes construction projects in the planning phase, with the following information for publicly-owned and privately-owned projects:

- Owner of Project with Address
- Description of Project
- Value of Project
- Location of Project

If the project goes to fruition, the general contractor, subcontractors, and the architect and engineer that bid are listed with the projects. M³ Consulting collected five years of data covering construction activity captured by Reed Elsevier in bid activity for the MSA and Bay Area. In terms of the value of the work, the only available information was the overall value of the project. The specific value of work performed by subcontractors was not available.

The project description, prime contractor, subcontractor, bidder, and architect/engineer, when available, were all provided in Microsoft Excel spreadsheets, with the common link being the project ID. Since Reed does not track the race or gender of the contractors, such information had to be created into the database by manual comparison of names to the Master S/M/W/DBE list.

4.3.3 DATA SOURCES FOR UTILIZATION

Utilization measures the distribution of dollars and contracts to commercial M/W/DBEs and Non-M/W/DBEs by BART. The sources of data sought from BART on M/W/DBE utilization for this report were Contract Awards, with Subcontractor Data, Purchase Orders (PO), with Subcontractor Data and Accounts Payables (AP), with Subcontractor data. The following are descriptions of utilization databases.

A. Contract Awards and Subcontractor Data

M³ Consulting gleaned BART's contract awards data from bid history data and contract logs that were provided to M³ Consulting by BART's Purchasing Department. The contract logs (in this case, the Procurement List) represent the universe of formal competitive contracts let by BART. Any contract valued greater than \$100,000 is required to be procured using formal competitive procurement methods. The contract logs included information regarding the value of contract award and the awarded firm. Additional data fields contained vendor contact information, contract identification number and, in most cases, the purpose for the

contract. M³ Consulting provided OCR with the list of contracts on the Procurement List, which OCR utilized to search for potential subcontract data.

BART provided M³ Consulting contract and subcontract award data contained in files maintained by Procurement, as well as OCR for all procurement categories. BART captured M/W/DBE subcontractor data from awarded vendors through bid tabulations maintained by both the District Secretary and the Procurement Department and DBE forms maintained by OCR. DBE bid forms summarize sub-bidder data from bid tabulations and bid files, mainly for the top three bidders. On a handful of contracts, starting in 2013, OCR captured all bidder and sub-bidders.

For On-Call A&E awards, sub award data in contract award data was not reliable against these indefinite quantity contracts. The focus at the point of contract award on these contracts are team members and hourly rates. Specific scopes of work are developed after contract award under work plans. (*See also purchase order discussion below in Section 4.3.3.B.*) M³ Consulting thus reviewed work plan summaries provided by Planning, Development and Construction (PDC) to glean work plan commitment data at the prime and subcontracting levels.

Once A&E and Construction Management contracts were moved to a separate category, there were very few Professional Services formal contracts remaining. Two large MWBE contracts³⁴⁶ against this smaller pool of formal contracts represented a significant percentage of Professional Services utilization. The analysis of PO data revealed that most Professional Services contracts fall under the \$100,000 threshold for competitive bidding.

B. Purchase Orders

Purchase Orders (POs) represent, in certain terms, the total value of a particular good or service for which payments may be made against. These are contract commitments representing the actual firm with which BART executed a contract, as compared to contract award, which represents vendors identified as the winning bidder, resulting from the bid and evaluation process. Unless there is a justifiable and legitimate business reason (i.e. negotiations with winning bidder that may have caused changes in scope and final cost), the winning bidder and winning bid amount including sub-bids, and contracted firm and contracted amount, along with subcontracts, should be the same. Differences may necessitate a deeper dive and further analysis to ensure that these differences are not due to discriminatory reasons. M³ Consulting leaned toward relying upon PO commitments, when

³⁴⁶ 6M8042, 2011, Community Outreach, \$6 million; 6M4281, District Worker's Compensation Program for Case Management Services, \$3.3 million.

there was limited or small levels of subcontracting in a procurement category, as it included all change orders, work plans, informal purchases commitments and other procurement opportunities not competitively bid. Conversely, relying on PO data, in procurement categories where there is subcontracting data would cause undercounting of DBEs, SBEs and MWBEs. In those instances, (mainly A&E and Construction), other data is relied upon.

M³ Consulting employed a similar process with the PO data classification, as with AP data, discussed below in Section 4.3.3.D.

1. Subcontractor Commitment Data

M³ Consulting also sought to capture PO subcontractor commitment data. Often, organizations desired to rely on subcontractor payment data. However, relying on subcontractor payments data versus awards/commitments data may create the following issues:

- Payments data may not completely represent total subcontractor utilization. Particularly given BART's multi-year construction and A&E projects, subcontracting payments, during the study period, on open-contracts, may be undercounted or overcounted M/W/DBE participation, solely due to project scheduling. As such, payments are most accurate and may only be usable on closed-contracts.
- Relying solely on payments data and foregoing a comparative analysis between awards/commitments and payments may also hide discriminatory practices at both the prime and subcontracting levels, as discussed earlier.

Subcontractor commitment data was captured utilizing two sources:

- OCR Vendor Payment Tracking System (VPTS)
- PDC On-Call Work Plan Summaries

a. Vendor Payment Tracking System (VPTS)

In 2013, OCR began its efforts to develop an M/W/DBE subcontractor commitment and payment tracking and monitoring system. OCR first sought commitment and payments data from Planning, Development and Construction (PDC), Maintenance and Engineering (M&E) and Procurement. These departments provided available data from summary reports and invoices/pay requests. Because of missing or incomplete commitment data, OCR requested that each prime contractor input its subcontractor commitments online on its awarded

contracts. This data is self-reported by the prime contractor. To the degree that data was available, OCR verified the self-reported commitments data against the commitments listed by the prime contractor on invoices. According to OCR, commitment and payment data is not complete for the earlier years of the study period, FY 2011 and FY 2012, because of incomplete data maintenance by BART departments. Further, during these early years, Non-M/W/DBE subcontractors were not included. Subcontractor scopes of work are also not included; as such, there is no verifiable source of information for assignment of Procurement Type or Commodity Code.

For purposes of data verification of the VPTS, M³ Consulting compared the A&E, Construction and Professional Services contract award data against VPTS commitment data.

| Table 4.2 | | | | |
|---|--|--|---|--------------------|
| Comparison of Contract Prime Award Amounts | | | | |
| Contract Awards Data vs VPTS | | | | |
| Procurement Type | # of Contracts with Different Prime Award Amounts | # of Contracts with No Prime Award Amount in VPTS | # of Contracts with Same Prime Amounts | Grand Total |
| A&E | 21 | 6 | 0 | 27 |
| Construction | 23 | 61 | 42 | 126 |
| Professional Services | 2 | 28 | 1 | 31 |
| Grand Total | 25 | 89 | 43 | 157 |

Source: BART Contract Awards, OCR VPTS, M³ Consulting

| Table 4.3 | | | | |
|--|--|--|---|--------------------|
| Comparison of Subcontract Award Amounts | | | | |
| Contract Awards Data vs VPTS | | | | |
| Procurement Type | # of Contracts with Different Sub Award Amounts | # of Contracts with No Sub Award Amount in VPTS | # of Contracts with Same Sub Amounts | Grand Total |
| A&E | 21 | 6 | 0 | 27 |
| Construction | 44 | 10 | 33 | 87 |
| Professional Services | 1 | 2 | 7 | 10 |
| Grand Total | 66 | 18 | 40 | 124 |

Source: BART Contract Awards, OCR VPTS, M³ Consulting

| Table 4.4 Comparison of Subcontractor Award Amounts Contract Awards Data vs VPTS Sub-Commitment Amounts and VPTS Subcontractor Payment Amounts | | | |
|---|-----------------------------|-----------------------------|--------------------------|
| Procurement Type | Subcontractor Awards | VPTS Sub Commitments | VPTS Sub Payments |
| A&E | 65,616,595 | 79,493,329 | 54,030,202 |
| Construction | 362,548,361 | 479,233,169 | 302,044,835 |
| Professional Services | 4,986,931 | 3,160,830 | 927,523 |
| Grand Total | 433,151,887 | 561,887,328 | 357,002,560 |

Source: BART Contract Awards, OCR VPTS, M³ Consulting

b. PDC On-Call A&E Work Plan Summaries

For On-Call A&E contracts, PDC’s financial analysts maintain work plan summaries, which summarizes commitments and payments for individual work plans against each On-call A&E contracts. Like the VPTS, work plan summaries were not available for every contract. When a work plan summary was not available, M³ Consulting utilized the actual invoice/pay request. We further compared the A&E work plan commitment data provided to M³ Consulting by PDC during this study against the VPTS commitment data. We found nine contracts in the On-Call A&E data that were not in the VPTS data. Conversely, we found four contracts in the VPTS data that were not in the On-call A&E data. Further, there are no matching awards/commitments or payment values at the prime or subcontractor level between the On-call A&E data and the VPTS data.

Because the On-call A&E work plan summaries data is maintained directly by PDC, which develops the work plans, M³ Consulting relied on PDC On-call subcontractor data, instead of VPTS data.

C. Accounts Payable

Accounts Payable data, provided by BART’s IT department, permitted utilization analysis based on actual payments to BART’s vendors. M³ Consulting historically allocates payments using commodity codes or object codes. The accounts payable data contained United Nations Standard Products and Services Code (UNSPSC) commodity codes, which were utilized for allocation of both POs and payments into procurement types. We note, however, that BART’s IT staff did not believe that the commodity codes assigned by BART staff were reliable; IT is working to educate staff on the importance of accurately inputting the most correct code. For this analysis, on contracts on the Procurement List, Procurement overrode the procurement

type assigned based on the UNSPSC commodity code with the procurement type assigned by M³ Consulting based on project description in the Procurement List and confirmed and adjusted by Procurement, where necessary. For all other transactions, M³ Consulting continued to rely on the UNSPSC code assigned by BART staff.³⁴⁷

M³ Consulting requested that all non-commercial payments to vendors be excluded from the analysis. To ensure that the non-commercial transactions were not included, M³ Consulting randomly selected vendors to ensure they were not governmental entities, non-profit entities or employees to the degree possible. Furthermore, M³ Consulting provided BART IT and Procurement with a listing of contract IDs contained in the financial management data so BART could verify, based on its contract ID assignment coding, if these contract IDs represented non-commercial transactions.

Like PO data, M³ Consulting relied on the On-call A&E Work Plan for subcontractor payments. The VPTS payments varied from Contract Awards and VPTS Commitments, as shown above in Tables 4.2 to 4.4.

4.3.4 DATA SOURCES FOR CAPACITY

A. U.S. Census Bureau

The U.S. Census Bureau conducts a Survey of Minority and Women-Owned Business Enterprises (SMOBE/SWOB) in a five-year cycle. The most recently published data are the results of the 2012 survey, published after submission of the Draft Final Report. M³ Consulting is not reporting this data.

B. Dunn & Bradstreet

As part of the Hoover's database, D&B provided firm sales and employee data by MBE and WBE status. Both sales and employees were broken down into different thresholds.

³⁴⁷ As a coding system, UNSPSC is a reliable and detailed system, similar to the National Institute of Governmental Purchases. While the disparity industry mainly relies on NAICS industry codes, M³ Consulting prefers NIGP codes or similar commodity coding systems, as they more accurately reflect the goods and services that BART actually procures and the firms that can provide those goods and services. NAICS does report the North American Product Classification System (NAPCS, a commodity code system utilized for statistical tabulations in the United States, Canada and Mexico, with a cross-walk to its NAICS industry codes.)

C. Survey

M³ Consulting conducted a survey of firms on the BART vendor registry and Master S/M/W/DBE list, with a focus on gathering capacity data for the regression analysis. The process involved creating a questionnaire, sample design, data collection and coding, analysis and interpretation. Questions were designed with the specific purpose of collecting information about the availability of firms seeking to do business with BART and the private sector and their capacity.

Typically, a sampling frame is defined by vendors registered to do business with BART and a random sample drawn enabling M³ Consulting to obtain information to make inferences about capacity of vendors in the analyzed population. M³ Consulting relied primarily on the combined vendor lists and the Master S/M/W/DBE list to run the survey. Due to the cost-effectiveness and implementation of online surveys, M³ Consulting emailed the survey link to the entire population of firms in these two aforementioned lists to maximize sample size. A total of 5,457 firms were sent an online survey link with a unique password.

Due to wrong or changed email addresses, 338 of such links sent were returned and 53 unsubscribed. Of the remaining firms, 1,413 opened the initial email invites and 162 opened the link. A first reminder was sent to 1,372 firms that opened the email and 137 firms opened the link. A second reminder resulted in 1,205 firms opening the emails and 99 of these firms opened the link. The total sample resulted in 285 firms that responded to the survey. Detailed analysis and results from the sample are discussed in Chapter 8: Capacity and Regression Analysis.

4.4 CONCLUSIONS

THIS STATISTICAL METHODOLOGY AND DATA COLLECTION DISCUSSION PROVIDES THE FOUNDATION FOR SUBSEQUENT STATISTICAL CHAPTERS. IT DETAILS THE TYPES OF ANALYSIS USED IN DISPARATE IMPACT STUDIES, AS WELL AS DISPARITY ANALYSIS IN CONTRACTING.

THE BASIC COMPARISON TO BE MADE IN DISPARITY STUDIES IS BETWEEN FIRMS OWNED BY MINORITIES AND/OR WOMEN (“MWBES”) AND OTHER FIRMS (“NON-MWBES”) *READY, WILLING AND ABLE TO PERFORM A PARTICULAR SERVICE (OR, AVAILABLE FIRMS) AND THE ACTUAL UTILIZATION OF SUCH BUSINESSES WITHIN THE GEOGRAPHIC PARAMETERS OF BOTH ITS PRIME*

CONTRACTORS AND THE POLITICAL AND LEGAL JURISDICTION FOR BART. THE CHAPTER DETAILS THE METHOD OF DEFINING THE GEOGRAPHIC MARKET AREA FOR BART, OUTLINES THE AVAILABILITY MODEL USED BY M³ CONSULTING, AND PROVIDES A DETAILED EXPLANATION OF ALTERNATE MEASURES OF UTILIZATION OF FIRMS IN CONTRACTING BY BART.

Following the model, a thorough discussion of the data sources used in the study, starting with the data collection process, the issues encountered in the process and the caveats that presented itself due to data limitations are laid out. This section discusses the degree of completeness of the data source and the limitation in analysis that result from the same.

CHAPTER 5: STATISTICAL ANALYSIS OF RELEVANT MARKET AND M/W/DBE AVAILABILITY

5.1 INTRODUCTION

This chapter presents data on M/W/DBE availability in the San Francisco Bay Area Rapid Transit District's (BART) relevant market. The conceptual issues in measuring availability are discussed in detail in Chapter IV, Statistical Methodology. The accurate calculation of availability is critical in disparity analysis. "*Actual availability*," as defined by M³ Consulting for the purposes of this study, provides the measure of the number of M/W/DBEs who are *ready, willing and able* to do business with BART. An over count or undercount of the pool of available M/W/DBEs can significantly alter findings of disparity. As such, M³ Consulting has developed an availability model that best captures those M/W/DBEs who are available to BART.

The first section of this chapter discusses the determination of the relevant market for BART. The second section presents the estimates of M/W/DBE availability for the five major industries: Architecture & Engineering; Construction; Professional Services; Other Services; and Procurement. The following availability measures are presented for each industry category and availability findings are summarized in the conclusions section:

- **Ready, Willing and Able Availability (RWASM)**
 - Level 1: Bidders and Sub-bidders
 - Level 2: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data
 - Level 3: Bidders, Sub-bidders, Formal and Informal Awards form PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data
 - Level 4: Bidders, Sub-bidders, Formal and Informal Awards form PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data, Planholders, Vendors

- **Marketplace Availability**
 - Dun & Bradstreet Availability
 - Reed Data (Shown in Chapter X, Private Sector Analysis)

5.2 RELEVANT MARKET

In the context of disparity studies, the relevant market establishes the geographical boundaries where a bulk of commercial transactions by the agency is conducted. The analysis of M/W/DBE availability and utilization are examined within this defined geographical market area. Based on the U.S. Supreme Court requirement that a MWBE and/or DBE program covers only those groups that have actually been affected by discrimination within the public entity's jurisdiction,³⁴⁸ most courts and disparity study consultants characterize the relevant market as the geographical area encompassing the majority of a public entity's commercial activity, commonly determined by a representation of over 70 percent of an entity's contract dollars.

The Supreme Court's *Croson* decision did not provide specific guidance on the estimation of relevant market for the purposes of constructing a factual predicate study. Based upon lower court rulings, however, there are two requirements for determining the relevant market that have emerged:

1. The boundaries of the relevant market must be geographically close to that of the political jurisdiction enacting the program; and,
2. The relevant market must include the bulk of the commercial activity of the said political jurisdiction.

Consequently, many disparity studies of local areas have identified the metropolitan statistical area (MSA) as the relevant market.³⁴⁹ Certain other entities, however, (*e.g.*, Dallas and Los Angeles) have restricted the relevant market to those firms within their jurisdictional boundaries.

³⁴⁸ *Richmond v. Croson*, 488 U.S. 469, 109 S.Ct. 706, 725 (1989).

³⁴⁹ See, for example, *Concrete Works v. Denver*, 823 F Supp 821, at 836, n. 11; rev'd on other grounds, 36 F3d 1513 (10th Cir. 1994). Some earlier studies followed antitrust precedent in using an 85 percent benchmark as the relevant market. See, *e.g.*, DJMA, *Disparity Study for the Orange County Consortium* (1993). The 2nd circuit has not provided any substantive guidance on the calculation of the relevant market for disparity studies.

5.2.1 RELEVANT MARKET FOR BART

In order to estimate availability, the marketplace in which BART purchases from vendors needs to be defined. This enables a practical count of “available” firms and also facilitates policy implementation.

Based on the data provided for this study, five relevant markets were defined and are presented below in Tables 5.1 and 5.2. M³ Consulting examined the San Francisco-Oakland-Hayward, CA MSA (MSA); San Francisco Bay Area (Bay Area); San Jose-San Francisco-Oakland, CA CSA (CSA); San Jose-San Francisco-Oakland, CA CSA plus Sacramento County (CSAPlus); and the State of California.

- San Francisco-Oakland-Hayward, CA MSA—consists of the following five counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo; This MSA is a subset of the San Francisco Bay Area;
- San Francisco Bay Area—consists of the following nine counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo, Solano, Napa, Santa Clara, Sonoma
- San Jose-San Francisco-Oakland, CA CSA—consists of the following twelve counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo, Solano, Napa, Santa Clara, Sonoma, San Joaquin, Santa Cruz, San Benito
- San Jose-San Francisco-Oakland, CA CSA + Plus Sacramento County—consists of the following twelve counties: Alameda, San Francisco, Contra Costa, Marin, San Mateo, Solano, Napa, Santa Clara, Sonoma, San Joaquin, Santa Cruz, San Benito, Sacramento County
- State of California
- Nationwide

The relevant market for each industry category is summarized in Table 5.1, for each procurement type by location because of the commercial activity that BART conducts with its vendors in different procurement areas. The summary table represents the percentage of bidders, vendors and awardees for each industry category by the relevant market determinations outlined in Tables 5.2 through 5.6.

A. A&E Relevant Market—MSA

For A&E, as shown in Table 5.2, M³ Consulting concluded that, when all measures are viewed in totality, the data pointed to the MSA as the relevant market, except bidders/awardees and Purchase Order counts.

B. Construction Relevant Market—Bay Area

Only location based on Purchase Order and Payments counts, which does not include subcontractors, points to the MSA as the relevant market. The percentage of location of firms, as well as the dollars awarded and paid out to Construction vendors by BART points to the Bay area as the relevant market (see Table 5.3).

C. Professional Services Relevant Market—State of California

The location of bidders, subbidders and awardees, as well as the dollars paid out to Professional service vendors points to the State of California as the relevant market, as noted in Table 5.4. Only Purchase Order dollars point to a smaller relevant market of the Bay Area.

D. Other Services Relevant Market—State of California

In Other Services, while the majority of bidders and subbidders are located in the Bay area (9 counties), the Awardee and Purchase Order counts, as well as Payments counts and dollars paid out to the vendors in this industry, define the relevant market as the State of California (see Table 5.5).

E. Procurement Relevant Market—Nationwide

All metrics in Table 5.6, measured by location of Procurement vendors, as well as dollars paid out to Procurement vendors, define the relevant market as not restricted to the State, but expansive to the Nation.

Chapter V
Statistical Analysis of Relevant Market
and M/W/DBE Availability

| Table 5.1. | | | | |
|---|------------|-----------------|--------------|-------------------|
| Summary of Relevant Market Determination | | | | |
| | MSA | Bay Area | State | Nationwide |
| Architecture and Engineering | √ | | | |
| Professional Services | | | √ | |
| Construction | | √ | | |
| Other Services | | | √ | |
| Procurement | | | | √ |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Plan Holders; BART Vendors

| Table 5.2. | | | | | | |
|--|------------|-----------------|------------|----------------|--------------|-------------------|
| Relevant Market Summary: Architecture and Engineering | | | | | | |
| | MSA | Bay Area | CSA | CSAPlus | State | Nationwide |
| | % | % | % | % | % | |
| Bidder/Subbidders | 76 | 83 | 84 | 85 | 96 | 330 |
| Bidders/Awardees | 59 | 65 | 67 | 67 | 78 | 646 |
| Purchase Order Counts | 64 | 65 | 65 | 66 | 75 | 2,290 |
| Payments Counts | 77 | 78 | 78 | 78 | 86 | 8,513 |
| Purchase Order Dollars | 78 | 78 | 78 | 79 | 88 | \$ 343,854,378 |
| Payments Dollars | 79 | 80 | 80 | 81 | 89 | \$ 249,191,684 |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors

Chapter V
Statistical Analysis of Relevant Market
and M/W/DBE Availability

| Table 5.3. | | | | | | |
|--|------------|-----------------|------------|----------------|--------------|-------------------|
| Relevant Market Summary: Construction | | | | | | |
| | MSA | Bay Area | CSA | CSAPlus | State | Nationwide |
| | % | % | % | % | % | |
| Bidder/Subbidders | 58 | 72 | 76 | 79 | 95 | 969 |
| Bidders/Awardees | 58 | 71 | 75 | 78 | 93 | 1,137 |
| Purchase Order Counts | 74 | 87 | 88 | 88 | 93 | 1,860 |
| Payments Counts | 80 | 90 | 90 | 90 | 97 | 3,206 |
| Purchase Order Dollars | 57 | 88 | 89 | 89 | 98 | \$ 1,130,714,761 |
| Payments Dollars | 68 | 97 | 97 | 97 | 99 | \$ 879,581,470 |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors

| Table 5.4. | | | | | | |
|---|------------|-----------------|------------|----------------|--------------|-------------------|
| Relevant Market Summary: Professional Services | | | | | | |
| | MSA | Bay Area | CSA | CSAPlus | State | Nationwide |
| | % | % | % | % | % | |
| Bidder/Subbidders | 59 | 63 | 63 | 68 | 85 | 158 |
| Bidders/Awardees | 50 | 56 | 57 | 61 | 75 | 605 |
| Purchase Order Counts | 51 | 56 | 56 | 63 | 77 | 1,645 |
| Payments Counts | 54 | 59 | 59 | 64 | 86 | 4,079 |
| Purchase Order Dollars | 70 | 71 | 72 | 74 | 84 | \$ 78,788,183 |
| Payments Dollars | 63 | 64 | 65 | 68 | 82 | \$ 38,342,500 |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors

| Table 5.5. | | | | | | |
|--|------------|-----------------|------------|----------------|--------------|-------------------|
| Relevant Market Summary: Other Services | | | | | | |
| | MSA | Bay Area | CSA | CSAPlus | State | Nationwide |
| | % | % | % | % | % | |
| Bidder/Subbidders | 63 | 77 | 80 | 80 | 92 | 109 |
| Bidders/Awardees | 51 | 60 | 62 | 64 | 78 | 372 |
| Purchase Order Counts | 58 | 63 | 63 | 64 | 77 | 805 |
| Payments Counts | 56 | 61 | 61 | 62 | 83 | 2,018 |
| Purchase Order Dollars | 59 | 73 | 74 | 74 | 83 | \$ 21,591,917 |
| Payments Dollars | 48 | 55 | 56 | 56 | 72 | \$ 7,126,721 |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors

| Table 5.6. | | | | | | |
|---|------------|-----------------|------------|----------------|--------------|-------------------|
| Relevant Market Summary: Procurement | | | | | | |
| | MSA | Bay Area | CSA | CSAPlus | State | Nationwide |
| | % | % | % | % | % | |
| Bidder/Subbidders | 36 | 41 | 43 | 44 | 57 | 189 |
| Bidders/Awardees | 26 | 34 | 35 | 36 | 52 | 1,194 |
| Purchase Order Counts | 32 | 38 | 38 | 39 | 53 | 14,329 |
| Payments Counts | 38 | 42 | 42 | 44 | 56 | 18,381 |
| Purchase Order Dollars | 22 | 23 | 23 | 24 | 30 | \$ 327,693,386 |
| Payments Dollars | 33 | 35 | 35 | 36 | 46 | \$ 132,390,317 |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors

5.3 AVAILABILITY DEFINITION

The availability measure is often in dispute and critical to defining disparity. One must be careful not to include all businesses as *ready, willing and able*, as such a calculation could produce a very broad pool of available firms, including those who are not interested or able to provide goods or services purchased by BART. Similarly, a very narrowly tailored measure of availability may exclude some potential bidders, by falsely classifying them as unable to perform the requirements of contracts. A detailed discussion about the availability model and measurement of Availability are provided in Chapter 4: Statistical Methodology. Pertinent to BART's data, the Ready, Willing and Able (RWASM) Availability Model levels are defined as follows:

Figure 5.1
RWASM Availability Model

BART RWASM Availability

1. Prime and sub-bidders by contract category for each year of study period

2. Prime and sub-bidders by contract category for fewer years

3. Prime bidders, sub-awardees, prime awardees (informal purchases) for each year of study period

4. Prime bidders, sub-awardees, prime awardees (informal purchases) for fewer years period

5. Prime bidders, sub-awardees, prime awardees (informal purchases) + Vendors + certified M/W/DBEs for fewer years period

Public SectorSM Availability

6. BART RWA measure+ similar public entity prime and sub-bidders

7. BART RWA measure + similar public entity prime and sub awardees

8. BART RWA measure + similar public entity prime, sub awardees and vendors + Master M/W/DBEs List

Marketplace Availability

9. Census

10. Dun & Bradstreet

11. Reed Construction Data

Source: M³ Consulting, Inc.

M³ Consulting’s RWASM Availability Model is further tailored to the robustness of BART’s specific databases available for analysis. RWASM availability is defined at Level 3 for the FY 2011-2014 period that includes prime and sub bidders, informal and non-competitive awardees and prime and sub awardees to comprise this availability pool. Level 3 RWASM Availability will be compared to utilization when determining disparity in Chapter 7, Statistical Analysis of M/W/DBE Disparity in Contracting.

Levels 1-4 are presented independently and cumulatively in Figure 5.2, as four measures of RWASM availability, with Level 3 being a combined pool of discrete available firms across these measures and Level 4 further including Plan Holders and BART Vendors who may or may not have bid with BART. In addition, the Total Available Firms are presented below, followed by availability by procurement type.

| Figure 5.2. | |
|---|--|
| BART Specific RWASM Availability Levels | |
| RWASM Availability Level | RWASM Availability Definition |
| Level 1 | BART Bidders and Sub-bidders |
| Level 2 | BART Bidders and Sub-bidders + Informal and Non-competitive Awardees* |
| Level 3 | BART Bidders and Sub-bidders + Informal and Non-competitive Awardees + Prime/Subcontractors** |
| Level 4 | BART Bidders and Sub-bidders + Informal and Non-competitive Awardees + Prime/Subcontractors + Plan Holders and BART Vendors*** |

Source: M³ Consulting

*From PeopleSoft Financial Management System

**From PDC Work Plan Data and OCR VPTS. Only subcontractors reflecting payments were included.

***Typically, Vendors and Plan Holders, along with certified M/W/DBEs would be reported separately. However, for BART, Vendors and Plan Holders are not of sufficient size for this analysis.

5.4 TOTAL AVAILABILITY

5.4.1 TOTAL RWASM AVAILABILITY

RWASM availability measures are presented in Table 5.7 for the study period. BART bidders and subbidders included a total of 1,755 available firms, including 1,229 (70.03 percent) Non-M/W/DBE firms and 400 (22.79 percent) M/W/DBEs. Expanding the availability pool to Level 3 to include informal and non-competitive awardees and prime and sub-contractors resulted in a larger pool of 3,963 available firms, with 3,261 Non-M/W/DBE (82.29 percent) and 485 M/W/DBE firms (12.24 percent) of total available firms. M/W/DBEs included 117 (2.95 percent) African American-owned firms, 130 (3.28 percent) Asian American-owned firms, 109 (2.75 percent) Hispanic American-owned firms, two (0.05 percent) Native American-owned firms and five (0.13 percent) Other MBEs, along with 122 (3.08 percent) Caucasian Female-

| | Nationwide | | | | | | | |
|------------------------------|--------------|---------------|--------------|---------------|--------------|---------------|--------------|---------------|
| | Level 1 | | Level 2 | | Level 3 | | Level 4 | |
| Race/Ethnicity/Gender | # | % | # | % | # | % | # | % |
| Non-M/W/DBE | 1,229 | 70.03 | 3,087 | 82.41 | 3,261 | 82.29 | 4,733 | 82.64 |
| African American | 92 | 5.24 | 110 | 2.94 | 117 | 2.95 | 178 | 3.11 |
| Asian American | 114 | 6.50 | 127 | 3.39 | 130 | 3.28 | 187 | 3.27 |
| Hispanic American | 94 | 5.36 | 102 | 2.72 | 109 | 2.75 | 131 | 2.29 |
| Native American | 2 | 0.11 | 2 | 0.05 | 2 | 0.05 | 2 | 0.03 |
| Other MBE | 3 | 0.17 | 3 | 0.08 | 5 | 0.13 | 16 | 0.28 |
| Total MBE | 305 | 17.38 | 344 | 9.18 | 363 | 9.16 | 514 | 8.98 |
| Caucasian Female | 95 | 5.41 | 108 | 2.88 | 122 | 3.08 | 140 | 2.44 |
| Total M/W/DBE | 400 | 22.79 | 452 | 12.07 | 485 | 12.24 | 654 | 11.42 |
| D&B MWBE | 126 | 7.18 | 207 | 5.53 | 217 | 5.48 | 340 | 5.94 |
| Total | 1,755 | 100.00 | 3,746 | 100.00 | 3,963 | 100.00 | 5,727 | 100.00 |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors

Level 1: Bidders and Sub-bidders

Level 2: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data

Level 3: Bidders, Sub-bidders, Formal and Informal Awards form PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data

Level 4: Bidders, Sub-bidders, Formal and Informal Awards form PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data, Planholders, Vendors

5.4.2 MARKETPLACE AVAILABILITY—TOTAL AVAILABILITY

As a benchmark to RWASM availability in the relevant market and the broadest measure of availability, we present marketplace availability using Dun & Bradstreet data. The limitations of this dataset are that firms in the D&B lists do not reflect those that may have necessarily expressed interest in bidding with BART. Based on the marketplace list, as presented in Table 5.8, in the Bay Area, there are 39,141 Non-MWBEs and a total of 7,147 MWBEs. In comparing Table 5.8 to 5.7, it shows that the percentage of minority firms in the marketplace is not that different at 15.44 percent than that of BART at 12.24 percent.

Table 5.8.
Dun & Bradstreet Availability
Total Availability
San Francisco Bay Area
FY 2014

| Ethnicity | # | % |
|----------------------|----------|----------|
| Non-MWBE | 39,141 | 84.56 |
| MBE | 1,973 | 4.26 |
| MWBE | 1,584 | 3.42 |
| WBE** | 3,590 | 7.76 |
| Total M/W/DBE | 7,147 | 15.44 |
| Total | 46,288 | 100.00 |

Source: 2014 D&B Hoovers Data; M³ Consulting

*9-County—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Napa, Solano, Sonom

**Equivalent to Caucasian Female-owned firms

5.5 AVAILABILITY IN ARCHITECTURE & ENGINEERING

5.5.1 RWASM AVAILABILITY IN ARCHITECTURE & ENGINEERING

Using Level 3 to define availability, the relevant market includes a total of 379 A&E contractors that attempted to or presently do business with BART; 113 (29.82 percent) of these are M/W/DBEs, who include 29 (7.65 percent) African American-owned firms, 39 (10.29 percent) Asian American-owned firms, 15 (3.96 percent) Hispanic American-owned firms, two (0.53 percent) Other MBEs, and 28 (7.39 percent) Caucasian Female-owned firms.

| Table 5.9. | | | | | | | | |
|--|----------------|---------------|----------------|---------------|----------------|---------------|----------------|---------------|
| RWASM Availability: Levels 1-4 | | | | | | | | |
| Architecture and Engineering Availability | | | | | | | | |
| San Francisco Bay Area Rapid Transit District | | | | | | | | |
| Relevant Market; FY-2011-2014 | | | | | | | | |
| | MSA* | | | | | | | |
| | Level 1 | | Level 2 | | Level 3 | | Level 4 | |
| Race/Ethnicity/Gender | # | % | # | % | # | % | # | % |
| Non-M/W/DBE | 131 | 51.98 | 204 | 60.00 | 236 | 62.27 | 340 | 64.89 |
| African American | 25 | 9.92 | 28 | 8.24 | 29 | 7.65 | 38 | 7.25 |
| Asian American | 36 | 14.29 | 38 | 11.18 | 39 | 10.29 | 48 | 9.16 |
| Hispanic American | 15 | 5.95 | 15 | 4.41 | 15 | 3.96 | 19 | 3.63 |
| Other MBE | 2 | 0.79 | 2 | 0.59 | 2 | 0.53 | 2 | 0.38 |
| Total MBE | 78 | 30.95 | 83 | 24.41 | 85 | 22.43 | 107 | 20.42 |
| Caucasian Female | 24 | 9.52 | 25 | 7.35 | 28 | 7.39 | 33 | 6.30 |
| Total M/W/DBE | 102 | 40.48 | 108 | 31.76 | 113 | 29.82 | 140 | 26.72 |
| D&B MWBE | 19 | 7.54 | 28 | 8.24 | 30 | 7.92 | 44 | 8.40 |
| Total | 252 | 100.00 | 340 | 100.00 | 379 | 100.00 | 524 | 100.00 |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors

*MSA—Consists of counties of San Francisco, Alameda, Contra Costa, Marin and San Mateo

Level 1: Bidders and Sub-bidders

Level 2: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data

Level 3: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data

Level 4: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data, Planholders, Vendors

5.5.2 MARKETPLACE AVAILABILITY – ARCHITECTURE & ENGINEERING

Using the marketplace to define availability, of a total 3,149 firms, there are a total of 678 architects and engineering MWBE contractors at 21.53 percent, which is lower than the RWASM Availability percentage of 29.82 percent. Of the MWBEs, 253 (8.03) are categorized by D&B as MBEs, 170 (5.40 percent as MWBEs), and 255 (8.10 percent) as WBEs.

| Table 5.10. | | |
|--|----------|----------|
| Dun & Bradstreet Availability | | |
| Architecture and Engineering Availability | | |
| San Francisco Bay Area | | |
| FY 2014 | | |
| Ethnicity | # | % |
| Non-MWBE | 2,471 | 78.47 |
| MBE | 253 | 8.03 |
| MWBE | 170 | 5.40 |
| WBE | 255 | 8.10 |
| Total M/W/DBE | 678 | 21.53 |
| Total | 3,149 | 100.00 |

Source: 2014 D&B Hoovers Data; M³ Consulting

*9-County—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Napa, Solano, Sonoma

**Equivalent to Caucasian Female-owned firms

5.6 CONSTRUCTION AVAILABILITY

5.6.1 RWASM AVAILABILITY IN CONSTRUCTION

Considering Level 3 to measure RWASM availability, a total of 803 construction contractors were available to BART in the Bay Area for the period FY 2011-14. Among these, M/W/DBEs comprised 22.91 percent or 184 contractors; 36 (4.48 percent of total) that were Caucasian Female-owned firms. The highest number of MBEs were Asian American-owned firms (52 or 6.48 percent) and Hispanic American-owned firms (55 or 6.85 percent), followed by 39 African American-owned firms at 4.86 percent of total available contractors in construction.

| Table 5.11. | | | | | | | | |
|--|------------------|---------------|----------------|---------------|----------------|---------------|----------------|---------------|
| RWASM Availability: Levels 1-4 | | | | | | | | |
| Construction Availability | | | | | | | | |
| San Francisco Bay Area Rapid Transit District | | | | | | | | |
| Relevant Market; FY-2011-2014 | | | | | | | | |
| | Bay Area* | | | | | | | |
| | Level 1 | | Level 2 | | Level 3 | | Level 4 | |
| Race/Ethnicity/Gender | # | % | # | % | # | % | # | % |
| Non-M/W/DBE | 456 | 65.52 | 500 | 66.67 | 540 | 67.25 | 950 | 74.51 |
| African American | 37 | 5.32 | 38 | 5.07 | 39 | 4.86 | 46 | 3.61 |
| Asian American | 50 | 7.18 | 52 | 6.93 | 52 | 6.48 | 62 | 4.86 |
| Hispanic American | 50 | 7.18 | 51 | 6.80 | 55 | 6.85 | 67 | 5.25 |
| Other MBE | 1 | 0.14 | 1 | 0.13 | 2 | 0.25 | 4 | 0.31 |
| Total MBE | 138 | 19.83 | 142 | 18.93 | 148 | 18.43 | 179 | 14.04 |
| Caucasian Female | 31 | 4.45 | 32 | 4.27 | 36 | 4.48 | 38 | 2.98 |
| Total M/W/DBE | 169 | 24.28 | 174 | 23.20 | 184 | 22.91 | 217 | 17.02 |
| D&B MWBE | 71 | 10.20 | 76 | 10.13 | 79 | 9.84 | 108 | 8.47 |
| Total | 696 | 100.00 | 750 | 100.00 | 803 | 100.00 | 1275 | 100.00 |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors

*Bay Area—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Napa, Solano, Sonoma

Level 1: Bidders and Sub-bidders

Level 2: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data

Level 3: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data

Level 4: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data, Planholders, Vendors

5.6.2 MARKETPLACE AVAILABILITY—CONSTRUCTION

In comparison to the RWASM availability at 22.91 percent, the marketplace availability of construction firms show a much smaller percentage of Total M/W/DBE firms at 11.82 percent. Caucasian Female-owned contractors represented 4.93 percent (379 firms) of total. However, the marketplace also indicates that there is a larger pool of Total M/W/DBE construction contractors at 908 firms, as compared to RWASM at 184 firms. These firms may potentially be available to BART through outreach.

Table 5.12.
Dun & Bradstreet Availability
Construction Availability
San Francisco Bay Area
FY 2014

| Ethnicity | # | % |
|----------------------|----------|----------|
| Non-MWBE | 6,775 | 88.18 |
| MBE | 364 | 4.74 |
| MWBE | 165 | 2.15 |
| WBE | 379 | 4.93 |
| Total M/W/DBE | 908 | 11.82 |
| Total | 7,683 | 100.00 |

Source: 2014 D&B Hoovers Data; M³ Consulting

*Bay Area—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Napa, Solano, Sonoma

**Equivalent to Caucasian Female-owned firms

5.7 PROFESSIONAL SERVICES AVAILABILITY

5.7.1 RWASM AVAILABILITY IN PROFESSIONAL SERVICES

Forty MBE firms and 14 Caucasian Female-owned firms were available, having met the RWASM availability criteria for Professional Services at BART in the relevant market. These firms represented 8.81 percent and 3.08 percent, respectively, of 454 professional service contractors available to BART. The 40 MBEs comprised of 18 African American-owned firms (3.96 percent) and 11 each of Asian American-owned (2.42 percent) and Hispanic American-owned firms (2.42 percent).

| Table 5.13. | | | | | | | | |
|--|----------------------------|---------------|----------------|---------------|----------------|---------------|----------------|---------------|
| RWASM Availability: Levels 1-4 | | | | | | | | |
| Professional Services Availability | | | | | | | | |
| San Francisco Bay Area Rapid Transit District | | | | | | | | |
| Relevant Market; FY-2011-2014 | | | | | | | | |
| | State of California | | | | | | | |
| | Level 1 | | Level 2 | | Level 3 | | Level 4 | |
| Race/Ethnicity/Gender | # | % | # | % | # | % | # | % |
| Non-M/W/DBE | 94 | 69.63 | 362 | 83.22 | 375 | 82.60 | 586 | 80.05 |
| African American | 11 | 8.15 | 17 | 3.91 | 18 | 3.96 | 35 | 4.78 |
| Asian American | 7 | 5.19 | 10 | 2.30 | 11 | 2.42 | 23 | 3.14 |
| Hispanic American | 7 | 5.19 | 10 | 2.30 | 11 | 2.42 | 13 | 1.78 |
| Other MBE | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 1 | 0.14 |
| Total MBE | 25 | 18.52 | 37 | 8.51 | 40 | 8.81 | 72 | 9.84 |
| Caucasian Female | 11 | 8.15 | 13 | 2.99 | 14 | 3.08 | 20 | 2.73 |
| Total M/W/DBE | 36 | 26.67 | 50 | 11.49 | 54 | 11.89 | 92 | 12.57 |
| D&B MWBE | 5 | 3.70 | 23 | 5.29 | 25 | 5.51 | 54 | 7.38 |
| Total | 135 | 100.00 | 435 | 100.00 | 454 | 100.00 | 732 | 100.00 |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors
 Level 1: Bidders and Sub-bidders
 Level 2: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data
 Level 3: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data
 Level 4: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data, Planholders, Vendors

5.7.2 MARKETPLACE AVAILABILITY—PROFESSIONAL SERVICES

The marketplace availability for professional services in Table 5.14 shows a greater percentage of MWBE firms at 14.45 percent compared to RWASM availability of 11.89 percent in Table 5.13. The marketplace availability also reflects a much larger pool of firms at 1,907 Total M/W/DBE firms out of 13,193 total firms. In comparison, there were 54 Total M/W/DBE firms out of 454 total firms in the RWASM availability pool. While these firms fall into NAIC codes representing BART products, through outreach efforts, BART could determine if these firms provide services actually utilized by BART and meet RWASM requirements, and are not simply represented because of their NAIC code.

| Table 5.14. | | |
|---|--------------|--------------|
| Dun & Bradstreet Availability | | |
| Professional Services Availability | | |
| San Francisco Bay Area | | |
| FY 2014 | | |
| Ethnicity | # | % |
| Non-MWBE | 11,286 | 85.55 |
| MBE | 444 | 3.37 |
| MWBE | 419 | 3.18 |
| WBE | 1,044 | 7.91 |
| Total M/W/DBE | <i>1,907</i> | <i>14.45</i> |
| Total | 13,193 | 100.00 |

Source: 2014 D&B Hoovers Data; M³ Consulting

*Bay Area—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Napa, Solano, Sonoma

**Equivalent to Caucasian Female-owned firms

5.8 OTHER SERVICES AVAILABILITY

5.8.1 RWASM AVAILABILITY IN OTHER SERVICES

In Other Services, a total of 291 firms were available, with eleven (3.78 percent) African American-owned firms, two (0.69 percent) Asian American-owned firms, four (1.37 percent) Hispanic American-owned firms and four (1.37 percent) Caucasian Female-owned firms. Non-M/W/DBE firms dominated the marketplace in Other Services, with over 83.5 percent of available firms that attempted to do business or did business with BART.

| Table 5.15. | | | | | | | | |
|--|----------------------------|---------------|----------------|---------------|----------------|---------------|----------------|---------------|
| RWASM Availability: Levels 1-4 | | | | | | | | |
| Other Services Availability | | | | | | | | |
| San Francisco Bay Area Rapid Transit District | | | | | | | | |
| Relevant Market; FY-2011-2014 | | | | | | | | |
| | State of California | | | | | | | |
| | Level 1 | | Level 2 | | Level 3 | | Level 4 | |
| Race/Ethnicity/Gender | # | % | # | % | # | % | # | % |
| Non-M/W/DBE | 77 | 77.00 | 226 | 85.28 | 243 | 83.51 | 508 | 81.94 |
| African American | 5 | 5.00 | 8 | 3.02 | 11 | 3.78 | 27 | 4.35 |
| Asian American | 0 | 0.00 | 2 | 0.75 | 2 | 0.69 | 12 | 1.94 |
| Hispanic American | 2 | 2.00 | 2 | 0.75 | 4 | 1.37 | 6 | 0.97 |
| Other MBE | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 1 | 0.16 |
| Total MBE | 7 | 7.00 | 12 | 4.53 | 17 | 5.84 | 46 | 7.42 |
| Caucasian Female | 1 | 1.00 | 1 | 0.38 | 4 | 1.37 | 5 | 0.81 |
| Total M/W/DBE | 8 | 8.00 | 13 | 4.91 | 21 | 7.22 | 51 | 8.23 |
| D&B MWBE | 15 | 15.00 | 26 | 9.81 | 27 | 9.28 | 61 | 9.84 |
| Total | 100 | 100.00 | 265 | 100.00 | 291 | 100.00 | 620 | 100.00 |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors
 Level 1: Bidders and Sub-bidders
 Level 2: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data
 Level 3: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data
 Level 4: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data, Planholders, Vendors

5.8.2 MARKETPLACE AVAILABILITY—OTHER SERVICES

The marketplace availability for Other Services appears to mirror the RWASM availability for Non-MWBEs, whereas MWBEs have a higher representation at 16.26 percent using Dun and Bradstreet availability, which includes all available firms. Given this, a total of 1,746 MWBEs are potentially available to BART. A little over 8.8 percent of firms in Other Services are Caucasian Female-owned firms that are potentially available, compared to only 1.37 percent of firms they represent among the RWASM available firms in Table 5.15.

| Table 5.16. | | |
|--|----------|----------|
| Dun & Bradstreet Availability | | |
| Other Services Availability | | |
| San Francisco Bay Area | | |
| FY 2014 | | |
| Ethnicity | # | % |
| Non-MWBE | 8,994 | 83.74 |
| MBE | 383 | 3.57 |
| MWBE | 411 | 3.83 |
| WBE | 952 | 8.86 |
| Total MWDBE | 1,746 | 16.26 |
| Total | 10,740 | 100.00 |

Source: 2014 D&B Hoovers Data; M³ Consulting

*Bay Area—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Napa, Solano, Sonoma

**Equivalent to Caucasian Female-owned firms

5.9 PROCUREMENT AVAILABILITY

5.9.1 RWASM AVAILABILITY IN PROCUREMENT

Procurement availability measured at Level 3 indicates a total of 1,194 firms that are ready, willing and able to conduct business with BART for the period FY 2011-14. A large majority of these firms are Non-M/W/DBEs, representing 93.63 percent or 1,118 firms. The remaining firms include eight (0.67 percent of total) Caucasian Female-owned firms, seven Hispanic American-owned firms and ten each (or 0.84 percent) of Asian American-owned and African American-owned firms. The total of M/W/DBEs does not exceed three percent of total available firms in procurement for the four-year study period.

| Table 5.17. | | | | | | | | |
|--|-------------------|---------------|----------------|---------------|----------------|---------------|----------------|---------------|
| RWASM Availability: Levels 1-4 | | | | | | | | |
| Procurement Availability | | | | | | | | |
| San Francisco Bay Area Rapid Transit District | | | | | | | | |
| Relevant Market; FY-2011-2014 | | | | | | | | |
| | Nationwide | | | | | | | |
| | Level 1 | | Level 2 | | Level 3 | | Level 4 | |
| Race/Ethnicity/Gender | # | % | # | % | # | % | # | % |
| Non-M/W/DBE | 164 | 86.77 | 1106 | 93.73 | 1,118 | 93.63 | 1,259 | 92.85 |
| African American | 4 | 2.12 | 9 | 0.76 | 10 | 0.84 | 14 | 1.03 |
| Asian American | 5 | 2.65 | 10 | 0.85 | 10 | 0.84 | 14 | 1.03 |
| Hispanic American | 4 | 2.12 | 7 | 0.59 | 7 | 0.59 | 8 | 0.59 |
| Other MBE | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 1 | 0.07 |
| Total MBE | 13 | 6.88 | 26 | 2.20 | 27 | 2.26 | 37 | 2.73 |
| Caucasian Female | 4 | 2.12 | 7 | 0.59 | 8 | 0.67 | 10 | 0.74 |
| Total M/W/DBE | 17 | 8.99 | 33 | 2.80 | 35 | 2.93 | 47 | 3.47 |
| D&B MWBE | 8 | 4.23 | 41 | 3.47 | 41 | 3.43 | 50 | 3.69 |
| Total | 189 | 100.00 | 1,180 | 100.00 | 1,194 | 100.00 | 1,356 | 100.00 |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; BART Vendors

Level 1: Bidders and Sub-bidders

Level 2: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data

Level 3: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data

Level 4: Bidders, Sub-bidders, Formal and Informal Awards from PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data, Planholders, Vendors

5.9.2 MARKETPLACE AVAILABILITY—PROCUREMENT

In contrast to the 2.93 percent that MWBEs represent in RWASM availability presented in Table 5.17, marketplace availability indicates 1,908 MWBE firms, representing 16.56 percent of total procurement firms in the Bay Area. Caucasian female-owned firms represent over eight percent of the total 11,523 firms in the Procurement industry, contrasted to only 0.67 percent represented by eight Caucasian female-owned firms among actually available firms as seen in Table 5.17.

Table 5.18.
Dun & Bradstreet Availability
Procurement Availability
San Francisco Bay Area
FY 2014

| Ethnicity | # | % |
|----------------------|---------------|---------------|
| Non-MWBE | 9,615 | 83.44 |
| MBE | 529 | 4.59 |
| MWBE | 419 | 3.64 |
| WBE | 960 | 8.33 |
| Total M/W/DBE | 1,908 | 16.56 |
| Total | 11,523 | 100.00 |

Source: 2014 D&B Hoovers Data; M³ Consulting

*Bay Area—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Napa, Solano, Sonoma

**Equivalent to Caucasian Female-owned firms

5.10 CONCLUSIONS

Table 5.19 below summarizes the availability estimates for M/W/DBEs within the relevant market for BART. It provides the estimates along with the source of the information. M³ Consulting places emphasis on the availability estimates, based on bidders, subbidders and awardees data at Level 3 of the RWASM model. The tables and the discussion are presented for the relevant markets by procurement type for all industries.

M³ Consulting's typically places credence on RWASM estimates derived from bidders, subbidders and awardees in that order of importance. Marketplace availability measures, based on D&B Availability, are presented as a benchmark of minority and women-owned firm availability (inclusive of certified and unverified MBEs/WBEs) and for BART to consider potentially available firms for outreach purposes.

For construction, MBE availability percentage is about 18.43 percent, which is almost evenly derived from the Asian American and Hispanic American MBE groups and a smaller portion to African American-owned firms. Caucasian Female-owned firms are similar to African American-owned firms in their availability in the construction industry at 4.48 percent available based on the RWASM availability measure. The marketplace availability measure based on construction shows a lower presence of MBEs in the industry and a similar presence of Caucasian Female-owned firms. In A&E, the availability of M/W/DBEs was at 29.82 percent based on RWASM availability estimates. MBEs were at 22.43 percent and Caucasian Females at 7.39 percent in the MSA marketplace. The Dun and Bradstreet availability measure shows a slightly lower representation in the marketplace of M/W/DBEs at 21.53 percent with Caucasian Female-owned firms almost at par with the RWASM availability estimate at 8.1 percent in the MSA. For Professional Services, M/W/DBEs availability based on RWASM availability was only at 11.89 percent, while the marketplace availability reflecting the upper bound of available firms was at 14.45 percent. MBEs and Caucasian Female-owned firm were both evenly low in availability based on RWASM availability estimates.

Other Services witnessed a declining pattern in M/W/DBEs presence with only 7.22 percent availability; Caucasian Female-owned firms represented 1.37 percent of availability. Marketplace estimates of available firms shows a higher proportion of M/W/DBEs at 16.26 percent and of Caucasian Female-owned firms at 8.86 percent. It may imply that Caucasian Female-owned firms are present in the market area, but do not participate in BART contracts. The presence of Caucasian Female-owned firms in Procurement is considerably higher in the market place at 8.33 percent compared to only 0.67 percent availability at BART. In general, the Procurement industry shows a very small presence of M/W/DBEs in the RWASM availability pool at 2.93 percent as opposed to 16.56 percent provided by Dun and

Chapter V
Statistical Analysis of Relevant Market
and M/W/DBE Availability

Bradstreet’s potentially available firms. Whether the latter meet the RWASM availability criteria or express interest in BART contracting process remains to be explored.

| Table 5.19. | | | | | |
|---|----------------------------|---------------------------------|---|-----------------------------------|--------------------------------|
| Summary Table - RWASM Availability Level 3 Percentage Participation | | | | | |
| San Francisco Bay Area Rapid Transit District | | | | | |
| Relevant Market; FY 2011 – 2014 | | | | | |
| Ethnicity | A&E¹ | Construction² | Professional Service³ | Other Services⁴ | Procurement⁵ |
| Race/Ethnicity/Gender | | | | | |
| Non-M/W/DBE | 62.27 | 67.25 | 82.60 | 83.51 | 93.63 |
| African American | 7.65 | 4.86 | 3.96 | 3.78 | 0.84 |
| Asian American | 10.29 | 6.48 | 2.42 | 0.69 | 0.84 |
| Hispanic American | 3.96 | 6.85 | 2.42 | 1.37 | 0.59 |
| Other MBE | 0.53 | 0.25 | 0.00 | 0.00 | 0.00 |
| Total MBE | 22.43 | 18.43 | 8.81 | 5.84 | 2.26 |
| Caucasian Female | 7.39 | 4.48 | 3.08 | 1.37 | 0.67 |
| Total M/W/DBE | 29.82 | 22.91 | 11.89 | 7.22 | 2.93 |
| D&B MWBE | 7.92 | 9.84 | 5.51 | 9.28 | 3.43 |
| Total | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning and Development Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Planholders; Bart Vendors

Level 3: Bidders, Sub-bidders, Formal and Informal Awards form PeopleSoft Data, Prime/Sub Payees from Work Plans and VPTS data

¹MSA

²Bay Area

³State of California

⁴Nationwide

Chapter V
Statistical Analysis of Relevant Market
and M/W/DBE Availability

Table 5.20.
D&B Summary Availability
San Francisco Bay Area
2014

| | A&E | | Construction | | Professional Services | | Other Services | | Procurement | |
|--------------------|-------|--------|--------------|--------|-----------------------|--------|----------------|--------|-------------|--------|
| | # | % | # | % | # | % | # | % | # | % |
| Non-MWBE | 2,471 | 78.47 | 6,775 | 88.18 | 11,286 | 85.55 | 8,994 | 83.74 | 9,615 | 83.44 |
| MBE | 253 | 8.03 | 364 | 4.74 | 444 | 3.37 | 383 | 3.57 | 529 | 4.59 |
| MWBE | 170 | 5.40 | 165 | 2.15 | 419 | 3.18 | 411 | 3.83 | 419 | 3.64 |
| WBE | 255 | 8.10 | 379 | 4.93 | 1,044 | 7.91 | 952 | 8.86 | 960 | 8.33 |
| Total MWDBE | 678 | 21.53 | 908 | 11.82 | 1,907 | 14.45 | 1,746 | 16.26 | 1,908 | 16.56 |
| Total | 3,149 | 100.00 | 7,683 | 100.00 | 13,193 | 100.00 | 10,740 | 100.00 | 11,523 | 100.00 |

Source: 2014 D&B Hoovers Data; M³ Consulting

*Bay Area—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Napa, Solano, Sonoma

**Equivalent to Caucasian Female-owned firms

CHAPTER 6: STATISTICAL ANALYSIS OF M/W/DBE UTILIZATION

6.1 INTRODUCTION

This chapter presents the utilization of M/W/DBEs by the San Francisco Bay Area Rapid Transit District in various projects of Architectural and Engineering Services, Construction, Professional Services, Other Services and Procurement. Utilization is measured and analyzed using contract awards, purchase order awards, and payments to M/W/DBEs from BART for the period 2011-2014. This covers the universe of all dollars and contracts awarded by BART.

M/W/DBE utilization in each of the major procurement categories listed above are discussed separately. Within each procurement category section, tables and discussions are presented to cover the data source, upon which M³ Consulting relies for conclusions and recommendations; tables representing other data sources considered are reflected in Appendix B. M/W/DBE utilization is also broken down by specific race, ethnicity and gender and is hereinafter referred to in text and tables as M/W/DBEs when discussing overall levels of participation for DBEs and MWBEs.

Contract awards data reflects both prime and subcontractor award dollars. The calculation of “prime + subcontractor awards data” reflects a reduction of the Prime Contractor award dollars by any subcontractor dollars. Subcontractor dollars are placed into the appropriate race/ethnicity/gender category. Accounts payable and purchase order payments reflect prime contractor payments only, as subcontractor payment data is not available. However, under On-call A&E Commitment and Payments data, subcontractor data is available, as work plan summaries detail amounts committed and payments made under each work plan at the prime and subcontracting levels.

The final section of this chapter covers threshold analysis and top ten awardees to further decipher any patterns in utilization of M/W/DBEs.

The following are some salient features of the overall chapter presentation:

- Utilization will be presented using the data collected from BART Purchasing Department, Financial Management Information System, and Planning, Development, and Construction (PDC) for all procurement types.
- The tables and discussions within the body of the chapter cover data pertaining to firms located within the relevant market for each procurement type.

6.2 TOTAL UTILIZATION BASED ON PURCHASE ORDERS AND PAYMENTS

This section provides a summary of total purchase orders (POs) and payments (AP) by race/ethnic/gender group for the period 2011-2014, regardless of procurement category. This view provides an overall picture of utilization of M/W/DBEs by BART. The analysis is then detailed by each procurement type.

Overall, a total of \$1.9 billion dollars was awarded to contractors by BART (see Table 6.1); \$1.13 billion of these dollars were in Construction, accounting for 59.4 percent. A&E and Procurement contractors received over \$300 million dollars, accounting for 18.1 percent and 17.2 percent of the total dollars respectively. Professional Service dollars accounted for 4.1 percent of the total at \$78.6 million, while Other Services' contractors received the remaining \$21.59 million or 1.1 percent of the monies from BART. These dollars were distributed largely to Non-M/W/DBEs, who received over 91 percent of the prime contract dollars overall, whereas MBEs as a group received 3.23 percent of the \$1.9 billion and Caucasian Female-owned firms only 0.13 percent of the \$1.9 billion in awards. M/W/DBEs that were not certified by BART or other public entities represented on M³ Consulting's Master S/M/W/DBE Certification list, but were in the Dun and Bradstreet list received about 5.33 percent of the dollars.

Payments of over \$1.3 billion (in Table 6.2) paints a similar picture, with over 90.7 percent of payments to Non-M/W/DBEs and 3.03 percent and 0.17 percent to MBEs and Caucasian Female-owned firms, respectively. Overall, the \$1.3 billion was largely paid out to Construction contractors at \$879.58 million (or 67 percent of total payments), followed by \$249 billion to A&E firms (19.1 percent). Over 10 percent of payments were to Procurement firms, 2.9 percent to Professional Service firms and 0.5 percent to firms in Other Services.

Chapter VI
Statistical Analysis of
M/W/DBE Utilization

Table 6.1.
Total Utilization
Purchase Orders
San Francisco Bay Area Rapid Transit District
All Counties, 2011 – 2014

| Ethnicity | A&E | | Construction | | Other Services | | Procurement | | Professional Services | | Total | |
|----------------------|--------------------|---------------|----------------------|---------------|-------------------|---------------|--------------------|---------------|-----------------------|---------------|----------------------|---------------|
| | \$ | % | \$ | % | \$ | % | \$ | % | | | \$ | % |
| Non-M/W/DBE | 287,966,664 | 83.75 | 1,044,912,832 | 92.41 | 17,577,125 | 81.41 | 318,831,109 | 97.30 | 67,899,892 | 86.29 | 1,737,187,622 | 91.31 |
| African American | 18,074,341 | 5.26 | 1,705,126 | 0.15 | 321,471 | 1.49 | 749,465 | 0.23 | 8,247,588 | 10.48 | 29,097,992 | 1.53 |
| Asian American | 26,527,427 | 7.71 | 54,040 | 0.00 | 203,444 | 0.94 | 934,575 | 0.29 | 128,500 | 0.16 | 27,847,986 | 1.46 |
| Hispanic American | - | 0.00 | 974,741 | 0.09 | 644,744 | 2.99 | 2,665,264 | 0.81 | 259,298 | 0.33 | 4,544,047 | 0.24 |
| Total MBE | 44,601,769 | 12.97 | 2,733,907 | 0.24 | 1,169,659 | 5.42 | 4,349,304 | 1.33 | 8,635,386 | 10.97 | 61,490,025 | 3.23 |
| Caucasian Female | 1,704,330 | 0.50 | 25,458 | 0.00 | 20,769 | 0.10 | 100,037 | 0.03 | 579,620 | 0.74 | 2,430,214 | 0.13 |
| Total M/W/DBE | 46,306,098 | 13.47 | 2,759,365 | 0.24 | 1,190,428 | 5.51 | 4,449,342 | 1.36 | 9,215,006 | 11.71 | 63,920,239 | 3.36 |
| D&B MWBE | 9,581,616 | 2.79 | 83,042,565 | 7.34 | 2,824,364 | 13.08 | 4,412,935 | 1.35 | 1,573,285 | 2.00 | 101,434,765 | 5.33 |
| Total | 343,854,378 | 100.00 | 1,130,714,761 | 100.00 | 21,591,917 | 100.00 | 327,693,386 | 100.00 | 78,688,183 | 100.00 | 1,902,542,626 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

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Statistical Analysis of
M/W/DBE Utilization

Table 6.2.
Total Utilization
Payments
San Francisco Bay Area Rapid Transit District
All Counties, 2011 – 2014

| Ethnicity | A&E | | Construction | | Other Services | | Procurement | | Professional Services | | Total | |
|----------------------|--------------------|---------------|--------------------|---------------|------------------|---------------|--------------------|---------------|-----------------------|---------------|----------------------|---------------|
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 211,436,611 | 84.85 | 810,052,821 | 92.10 | 6,497,640 | 91.17 | 127,752,883 | 96.50 | 30,435,641 | 79.38 | 1,186,175,596 | 90.78 |
| African American | 7,022,985 | 2.82 | 1,288,270 | 0.15 | 176,314 | 2.47 | 576,986 | 0.44 | 6,077,853 | 15.85 | 15,142,408 | 1.16 |
| Asian American | 22,660,820 | 9.09 | 30,810 | 0.00 | - | 0.00 | 786,017 | 0.59 | 79,595 | 0.21 | 23,557,241 | 1.80 |
| Hispanic American | - | 0.00 | 157,990 | 0.02 | - | 0.00 | 558,905 | 0.42 | 216,036 | 0.56 | 932,930 | 0.07 |
| Total MBE | 29,683,805 | 11.91 | 1,477,070 | 0.17 | 176,314 | 2.47 | 1,921,907 | 1.45 | 6,373,483 | 16.62 | 39,632,579 | 3.03 |
| Caucasian Female | 1,701,518 | 0.68 | 25,458 | 0.00 | - | 0.00 | 57,621 | 0.04 | 450,591 | 1.18 | 2,235,188 | 0.17 |
| Total M/W/DBE | 31,385,323 | 12.59 | 1,502,528 | 0.17 | 176,314 | 2.47 | 1,979,528 | 1.50 | 6,824,075 | 17.80 | 41,867,768 | 3.20 |
| D&B MWBE | 6,368,750 | 2.56 | 68,026,121 | 7.73 | 452,768 | 6.35 | 2,657,906 | 2.01 | 1,082,784 | 2.82 | 78,588,329 | 6.01 |
| Total | 249,190,684 | 100.00 | 879,581,470 | 100.00 | 7,126,721 | 100.00 | 132,390,317 | 100.00 | 38,342,500 | 100.00 | 1,306,631,692 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

6.3 UTILIZATION BY PROCUREMENT TYPE

The tables on the following pages summarize the relevant contract award, purchase order and payments data by procurement type within the relevant market. The relevant market or the geographic area where BART vendors are located is the five-county San Francisco-Oakland-Hayward, CA MSA, San Francisco nine-county Bay Area, the State of California and Nationwide (All Counties). The relevant market as was discussed in the Availability Section is the MSA for Architecture and Engineering, the Bay Area for Construction, the State of California for Professional and Other Services and Nationwide for Procurement. The table below summarizes this information for each procurement type:

| Table 6.3. | | | | |
|---|------------|-----------------|--------------|-------------------|
| Summary of Relevant Market Determination | | | | |
| | MSA | Bay Area | State | Nationwide |
| Architecture and Engineering | √ | | | |
| Professional Services | | | √ | |
| Construction | | √ | | |
| Other Services | | | √ | |
| Procurement | | | | √ |

Source: M³ Consulting; BART Procurement Bidder Data, PeopleSoft Final Data, BART Planning, Development, and Construction Work Plan Data; BART OCR Vendor Payment Tracking Data; BART Plan Holders; BART Vendors

6.4 ARCHITECTURE & ENGINEERING UTILIZATION BASED ON PDC ON-CALL PAYMENTS AND ON-CALL COMMITMENTS

In Architecture & Engineering (A&E), M³ Consulting relied on BART On-call Payments data maintained by the Planning, Development and Construction Department. On-call A&E Commitment data represents work plans issued against awarded and executed On-call A&E contracts, which are indefinite quantity contracts, with a budget limit. However, prime vendors have the flexibility to execute the agreed upon work plan as they deem appropriate. As such, the Commitment amounts at the prime and subcontract level may change. Because of this, On-call A&E Payments data represents the most reliable data on actual prime and subcontract activity for A&E. Both On-call A&E Payments and On-call A&E Commitments are reflected in this section. Purchase order and payments data is provided in Appendix B. The relevant market for Architecture & Engineering is the San Francisco-Oakland-Hayward, CA MSA.

6.4.1 On-Call A&E Payments

Based on Tables 6.4, On-call A&E Payments amounted to \$96.7 million over the 2011-2014 period. This does not include On-call A&E Payments for contracts awarded and commitments made prior to 2011. MBEs received 32.15 percent or \$31 million, while Caucasian Female-owned firms received 2.45 percent of the A&E payments or \$2.4 million.

Overall, African American-owned firms were paid \$7.1 million and Asian American-owned firms were paid \$22.61 million, the latter accounting for the majority of the dollars that went to MBEs. Hispanic-owned firms were paid 1.37 percent of the dollars or \$1.3 million. For African American-owned firms, a majority of the \$7.1 million came in 2012, which accounted for over 14 percent of the total dollars for that year. Although a smaller amount at \$1.1 million in 2013, they received over 29 percent of the dollars for the year in A&E contracts.

Asian American MBEs received a majority of the \$22.6 million in 2011 at \$18.3 million and in 2012 at \$3.5 million. Hispanic American-owned A&E contractors were paid the most dollars in 2011, \$1.1 million. Overall, they received only \$1.3 million of the total \$96.7 million, accounting for less than 2 percent of the dollars. Caucasian Female-owned A&E firms were paid \$2.4 million for the study period, of which \$1.7 million was from payments in 2012. D&B MWBE firms that were MWBEs listed as such on the D&B list were paid \$3.8 million in 2012, which comprised the majority of the \$4.2 million or 4.4 percent they were paid overall.

While Table 6.4 breaks down On-call A&E payments by year over the study period, Table 6.5 reflects the data by prime and subcontract dollars, as well as by Federal and Non-federal dollars.

Of the total \$96.7 million A&E On-call A&E Payments, \$59.1 million (61 percent) went to prime contractors and the remaining \$37.5 million (39 percent) to subcontractors. In pure prime contracting, Non-M/W/DBE firms received a majority (58.71 percent) of the dollars, while MBEs and Caucasian Female-owned firms received 33.82 percent and 2.18 percent of the \$59.1 million pure prime dollars, respectively. Similarly, in subcontracting, Non-M/W/DBEs were paid about 65 percent of the dollars at \$24.3 million, while MBEs and Caucasian Female-owned firms received 29.51 percent and 2.88 percent respectively of the \$37.5 million in subcontract payments. The bulk of the pure prime and subcontract MBE dollars went to Asian American-owned firms at 26.90 percent of prime contract dollars and 17.85 percent of subcontract dollar. African American-owned firms received 11.17 percent of subcontract payments, while Hispanic American-owned firms received \$1.1 million (1.93 percent) in pure prime payments and \$183,308 (0.49 percent) in subcontract payments. Caucasian Female-owned firms received 2.18 percent of pure prime dollars and 2.88 percent of subcontract payments in A&E.

A majority of the Federal and Non-federal pure prime plus sub dollars in A&E went to Non-M/W/DBEs at about 61 percent for both. MBEs received about 25 percent of \$44 million in Federal payments and 37.9 percent of \$52 million in Non-federal payments. Of the Federal dollars, African American-owned firms received \$6.5 million (14.95 percent) of the \$11 million MBE dollars; \$4.3 million (9.91 percent) was committed to Asian American A&E firms. Hispanic American-owned firms received less than \$200,000 in Federal contracts, accounting for less than one percent of these Federal A&E pure prime and sub payments. Caucasian Female-owned firms received \$2 million (or 4.62 percent) in pure prime and sub-contracting payments on Federal contracts. D&B MWBEs received 9.58 percent of the Federal dollars at \$4.2 million. The Non-federal payments depicted a slightly different distribution. Non-federal awards were largely divided up between Non-M/W/DBEs and Asian American-owned A&E firms who received 61.50 percent (\$32.5 million) and 34.58 percent (\$18.3 million) respectively. Hispanic American-owned firms received 2.16 percent, African American-owned firms received 1.11 percent and Caucasian Female-owned firms received 0.65 percent of Non-federal awards.

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| Table 6.4. | | | | | | | | | | |
|--|-------------------|---------------|-------------------|---------------|------------------|---------------|------------------|---------------|-------------------|---------------|
| Architecture and Engineering | | | | | | | | | | |
| Pure Prime + Sub Contract—PDC On-call Payments, Dollars | | | | | | | | | | |
| San Francisco Bay Area Rapid Transit District | | | | | | | | | | |
| Relevant Market, 2011 – 2014 | | | | | | | | | | |
| | MSA* | | | | | | | | | |
| | 2011 | | 2012 | | 2013 | | 2014 | | Total | |
| Ethnicity | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 32,478,525 | 61.50 | 22,532,676 | 61.08 | 2,200,334 | 60.90 | 1,808,198 | 54.01 | 59,019,734 | 61.06 |
| African American | 587,180 | 1.11 | 5,250,897 | 14.23 | 1,051,612 | 29.11 | 252,915 | 7.55 | 7,142,603 | 7.39 |
| Asian American | 18,262,347 | 34.58 | 3,504,682 | 9.50 | 1,600 | 0.04 | 840,722 | 25.11 | 22,609,351 | 23.39 |
| Hispanic American | 1,140,424 | 2.16 | 96,309 | 0.26 | - | 0.00 | 85,999 | 2.57 | 1,322,732 | 1.37 |
| Total MBE | 19,989,951 | 37.85 | 8,851,888 | 23.99 | 1,053,212 | 29.15 | 1,179,636 | 35.23 | 31,074,686 | 32.15 |
| Caucasian Female | 341,469 | 0.65 | 1,666,183 | 4.52 | 359,500 | 9.95 | - | 0.00 | 2,367,152 | 2.45 |
| Total M/W/DBE | 20,331,420 | 38.50 | 10,518,071 | 28.51 | 1,412,712 | 39.10 | 1,179,636 | 35.23 | 33,441,839 | 34.60 |
| D&B MWBE | - | 0.00 | 3,842,356 | 10.41 | - | 0.00 | 360,173 | 10.76 | 4,202,529 | 4.35 |
| Total | 52,809,945 | 100.00 | 36,893,103 | 100.00 | 3,613,047 | 100.00 | 3,348,006 | 100.00 | 96,664,101 | 100.00 |

Source: BART Planning and Development On-Call Work Plan Summaries, M³ Consulting,

*MSA—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo

NOTE: There were 53 contracts that had payment data, as reflected in Table 6.4, but no commitment data, as reflected in Table 6.6.

Table 6.5.
Architecture and Engineering
Pure Prime + Sub Contract—PDC On-call Payments, Detailed
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| | MSA* | | | | | | | | | |
|----------------------|-------------------|---------------|-------------------|---------------|---------------------|---------------|---------------------|---------------|------------------------|---------------|
| | Pure Prime + Sub | | Pure Prime Only | | Subcontractors Only | | Federal Prime + Sub | | Nonfederal Prime + Sub | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 59,019,734 | 61.06 | 34,721,756 | 58.71 | 24,297,977 | 64.76 | 26,541,208 | 60.52 | 32,478,525 | 61.50 |
| African American | 7,142,603 | 7.39 | 2,952,491 | 4.99 | 4,190,112 | 11.17 | 6,555,424 | 14.95 | 587,180 | 1.11 |
| Asian American | 22,609,351 | 23.39 | 15,911,699 | 26.90 | 6,697,652 | 17.85 | 4,347,004 | 9.91 | 18,262,347 | 34.58 |
| Hispanic American | 1,322,732 | 1.37 | 1,140,424 | 1.93 | 182,308 | 0.49 | 182,308 | 0.42 | 1,140,424 | 2.16 |
| Total MBE | 31,074,686 | 32.15 | 20,004,614 | 33.82 | 11,070,072 | 29.51 | 11,084,735 | 25.28 | 19,989,951 | 37.85 |
| Caucasian Female | 2,367,152 | 2.45 | 1,287,444 | 2.18 | 1,079,709 | 2.88 | 2,025,683 | 4.62 | 341,469 | 0.65 |
| Total M/W/DBE | 33,441,839 | 34.60 | 21,292,057 | 36.00 | 12,149,781 | 32.38 | 13,110,419 | 29.90 | 20,331,420 | 38.50 |
| D&B MWBE | 4,202,529 | 4.35 | 3,131,190 | 5.29 | 1,071,339 | 2.86 | 4,202,529 | 9.58 | 0 | 0.00 |
| Total | 96,664,101 | 100.00 | 59,145,004 | 100.00 | 37,519,097 | 100.00 | 43,854,156 | 100.00 | 52,809,945 | 100.00 |

Source: BART Procurement, M³ Consulting,

*MSA—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo

6.4.2 On-Call A&E Commitments

Comparatively, based on Tables 6.6, On-call A&E Commitments amounted to \$129.5 million over the 2011-2014 period with Non-M/W/DBE firms receiving 59 percent of these commitments or \$76.4 million in the relevant market. In contrast MBEs received 33.25 percent or \$43 million, while Caucasian Female-owned firms received 2.64 percent of the A&E contract dollars or \$3.4 million.

Overall, African American-owned firms were awarded work plans in the amount of \$19.6 million and Asian American-owned firms were awarded \$21.2 million, accounting for the majority of the dollars that went to MBEs. Hispanic-owned firms received only 1.7 percent of the dollars. For African American-owned firms, a majority of the \$19 million came in 2012, representing over 26 percent of the total dollars for that year. Although a smaller amount at \$1.8 million in 2013, they received over 33 percent of the dollars for that year in A&E contracts.

Table 6.7 shows the data by prime and sub contract dollars, as well as by Federal and Non-federal dollars. Of the total \$129.5 million On-call A&E Commitments, \$90.4 million (70 percent) went to prime contractors and the remaining \$39.1 million (30 percent) to subcontractors. In pure prime contracting, Non-M/W/DBE firms received a majority (66.3 percent) of the dollars, while MBEs and Caucasian Female-owned firms received 27.79 percent and 2.64 percent of the \$90.4 million pure prime dollars, respectively. In subcontracting, Non-M/W/DBEs and MBEs received about the same dollar commitments at \$16.5 million (42.16 percent) and \$17.95 million (45.87 percent) respectively of the \$39 million sub commitments. The bulk of the pure prime contracting and sub-contracting MBE dollars went to African American- and Asian American-owned firms. Hispanic American-owned firms received \$1.2 million (1.37 percent) in pure prime commitments and \$962,052 (2.46 percent) in sub-contracting commitments. Caucasian Female-owned firms received the same 2.64 percent of pure prime and sub-contracting commitment amounts in A&E.

A majority of the Federal and Non-federal pure prime plus sub dollars in A&E went to Non-M/W/DBEs. MBEs received about 32 percent of Federal dollars and 35.9 percent of Non-federal dollar commitments. Caucasian Female-owned firms received \$2.9 million (or 3.27 percent) in pure prime and sub-contracting dollars on Federal contracts and 1.18 percent of Non-federal awards.

When comparing On-call A&E Payments in Table 6.4 to On-call A&E Commitments in Table 6.6, the analysis reveals different proportions for some MBE groups. Overall, payments and commitments to M/W/DBEs were similar, at 34.60 percent for payments and 35.89 percent for commitments. However, upon a more detailed review, Asian American-owned firms received a higher proportion of payments (23.39 percent) than commitments (16.38 percent). In contrast, African American-owned firms received 7.39 percent in actual payments, while awarded 15.17 percent in work plan commitments. Hispanic American and Caucasian Female-owned firms received similar proportions of dollars in payments and commitments.

Table 6.6.
Architecture and Engineering
Pure Prime + Sub Contract—PDC On-Call Commitments
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | MSA* | | | | | | | | | |
|----------------------|-------------------|---------------|-------------------|---------------|------------------|---------------|-------------------|---------------|--------------------|---------------|
| | 2011 | | 2012 | | 2013 | | 2014 | | Total | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 24,461,377 | 62.91 | 33,839,726 | 56.47 | 3,301,962 | 57.97 | 14,869,051 | 59.26 | 76,472,116 | 59.01 |
| African American | 357,284 | 0.92 | 15,815,642 | 26.39 | 1,897,174 | 33.31 | 1,595,503 | 6.36 | 19,665,604 | 15.17 |
| Asian American | 12,369,088 | 31.81 | 3,440,940 | 5.74 | 28,405 | 0.50 | 5,389,266 | 21.48 | 21,227,699 | 16.38 |
| Hispanic American | 1,238,855 | 3.19 | | 0.00 | - | 0.00 | 962,052 | 3.83 | 2,200,907 | 1.70 |
| Total MBE | 13,965,227 | 35.91 | 19,256,582 | 32.14 | 1,925,579 | 33.80 | 7,946,821 | 31.67 | 43,094,210 | 33.25 |
| Caucasian Female | 458,642 | 1.18 | 2,387,262 | 3.98 | 468,744 | 8.23 | 108,900 | 0.43 | 3,423,548 | 2.64 |
| Total M/W/DBE | 14,423,869 | 37.09 | 21,643,844 | 36.12 | 2,394,323 | 42.03 | 8,055,721 | 32.11 | 46,517,758 | 35.89 |
| D&B MWBE | | 0.00 | 4,438,977 | 7.41 | | 0.00 | 2,165,162 | 8.63 | 6,604,140 | 5.10 |
| Total | 38,885,246 | 100.00 | 59,922,548 | 100.00 | 5,696,285 | 100.00 | 25,089,935 | 100.00 | 129,594,014 | 100.00 |

Source: BART Planning, Development, and Construction On-Call Work Plan Summaries, M³ Consulting,

*MSA—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo

NOTE: There were 53 contracts that had payment data, as reflected in Table 6.4, but no commitment data, as reflected in Table 6.6.

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Table 6.7.
Architecture and Engineering
Pure Prime + Sub Contract—PDC On-call Commitments, Detailed
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | MSA* | | | | | | | | | |
|----------------------|--------------------|---------------|-------------------|---------------|---------------------|---------------|---------------------|---------------|------------------------|---------------|
| | Pure Prime + Sub | | Pure Prime Only | | Subcontractors Only | | Federal Prime + Sub | | Nonfederal Prime + Sub | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 76,472,116 | 59.01 | 59,967,734 | 66.30 | 16,504,383 | 42.16 | 52,010,740 | 57.34 | 24,461,377 | 62.91 |
| African American | 19,665,604 | 15.17 | 13,367,865 | 14.78 | 6,297,739 | 16.09 | 19,308,320 | 21.29 | 357,284 | 0.92 |
| Asian American | 21,227,699 | 16.38 | 10,531,028 | 11.64 | 10,696,671 | 27.32 | 8,858,610 | 9.77 | 12,369,088 | 31.81 |
| Hispanic American | 2,200,907 | 1.70 | 1,238,855 | 1.37 | 962,052 | 2.46 | 962,052 | 1.06 | 1,238,855 | 3.19 |
| Total MBE | 43,094,210 | 33.25 | 25,137,747 | 27.79 | 17,956,462 | 45.87 | 29,128,983 | 32.11 | 13,965,227 | 35.91 |
| Caucasian Female | 3,423,548 | 2.64 | 2,387,262 | 2.64 | 1,036,286 | 2.65 | 2,964,906 | 3.27 | 458,642 | 1.18 |
| Total M/W/DBE | 46,517,758 | 35.89 | 27,525,009 | 30.43 | 18,992,749 | 48.52 | 32,093,889 | 35.38 | 14,423,869 | 37.09 |
| D&B MWBE | 6,604,140 | 5.10 | 2,953,093 | 3.27 | 3,651,046 | 9.33 | 6,604,140 | 7.28 | - | 0.00 |
| Total | 129,594,014 | 100.00 | 90,445,836 | 100.00 | 39,148,178 | 100.00 | 90,708,768 | 100.00 | 38,885,246 | 100.00 |

Source: BART Procurement, M³ Consulting,

*MSA—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo

6.5 CONSTRUCTION UTILIZATION BASED ON CONTRACT AWARDS

In the area of Construction, M/W/DBE utilization is presented using contract awards, with purchase order and payments data in Appendix B. The relevant market for Construction is the San Francisco Bay Area.

Based on Table 6.8, a total of over \$491 million was awarded in pure prime and sub-contracting over the study period of 2011-14; 75.23 percent of contract awards was awarded to Non-M/W/DBEs, 11.38 percent to MBEs and 2.02 percent to Caucasian Female-owned firms. Among the MBEs, Hispanic American-owned firms received the largest total value of awards, with over \$22.6 million (4.62 percent of total), followed by Asian American-owned firms at \$17.9 million (3.65 percent of total) and African American-owned firms at \$15.29 million (3.11 percent of total). D&B MWBEs were awarded over \$55.9 million accounting for 11.38 percent of the dollars.

The pattern of dollars over the four-year period did not vary much by race/ethnicity or gender. Dollar awards received by Hispanic American-owned firms were fairly evenly spread, except for 2012, when their level of participation was 2.09 percent, down from the approximately 4 to 5 percent in other years. African American-owned firms saw their highest levels of participation in 2011 and 2014 at 3.70 percent and 2.92 percent, respectively. Asian American-owned firm dollars were more evenly spread across the four years, hovering around 5 to 6 million dollars, except in 2013, when they received only \$1.8 million. Caucasian Female-owned firms were awarded over \$7.4 million in 2011, but saw significantly less in other years of the study period, with about half a million dollars in 2012 and 2013 and \$1.3 million in 2014. However, in none of the years did Caucasian Female-owned firms capture more than 3 percent of the dollars. D&B MWBEs captured over \$25 million of their total \$55.9 million in 2011, followed by another bountiful year in 2012, with over \$18 million in awards.

Table 6.9 breaks down total construction dollars by pure prime and subcontracting awards, as well as Federal and Non-federal awards. Of the total \$491 million in Construction, pure prime awards represented about 68 percent and sub-contracting awards about 32 percent. MBE pure prime contractors received only 0.85 percent (\$2.85 million) of the total pure prime contracting dollars of over \$336 million.

When viewing the levels of participation of M/W/DBEs in more detail from Table 6.9, Caucasian Female-owned firms received no pure prime contracting dollars, but received 6.38 percent (\$9.9 million) of the sub-contracting dollars. In each MBE group, there was a similar

pattern witnessed. African American-owned firms received 0.07 percent of the pure prime awards in Construction, but 9.7 percent (over \$15 million) in subcontract dollars; Asian American-owned firms were awarded 0.08 percent of pure prime construction contract dollars and 11.38 percent (\$17.7 million) in subcontract awards; Hispanic American-owned Construction firms received 0.70 percent of pure prime dollars and 13.11 percent of the subcontract awards. Overall, M/W/DBEs received less than one percent of pure prime dollars, but a little over 40 percent of subcontracting dollars. D&B MWBEs receive over 9.62 percent of pure prime contracting award dollars and over 15 percent of subcontracting dollars. But, both in pure prime contracts and in subcontracts, Non-M/W/DBEs received the majority of the dollars at 89.53 percent and 44.23 percent respectively.

Over 80 percent of the Construction dollars were in Non-federal projects, which had no race and gender-conscious goals, whereas the remaining 20 percent were in federal projects, nearly all of which had DBE goals. In both cases, Non-M/W/DBEs received the majority of the awards, receiving over 76 percent of Non-federal dollars in Construction and 69 percent of the Federal dollars in Construction. MBEs received about \$13.3 million in Federal dollars (13.92 percent) and over \$42.6 million (10.76 percent of total) of Non-federal dollars.

The MBE groups by race/ethnicity were utilized in similar proportions in Federal and Non-federal contracts. Asian American-owned firms and Caucasian Female-owned firms fared better on Federal awards, than Non-federal awards in terms of proportion of the category, but not in terms of actual dollars. Conversely, African American-owned firms fared better on Non-federal awards. Hispanic American-owned firms' proportions were almost the same for both Federal and Non-Federal Awards.

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Table 6.8.
Construction
Pure Prime + Sub Contract Awards
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| | Bay Area* | | | | | | | | | |
|----------------------|--------------------|---------------|-------------------|---------------|-------------------|---------------|-------------------|---------------|--------------------|---------------|
| | 2011 | | 2012 | | 2013 | | 2014 | | Total | |
| Ethnicity | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 241,192,644 | 78.59 | 24,355,546 | 48.23 | 33,402,147 | 82.65 | 70,872,523 | 75.58 | 369,822,861 | 75.23 |
| African American | 11,369,479 | 3.70 | 710,000 | 1.41 | 480,000 | 1.19 | 2,736,590 | 2.92 | 15,296,069 | 3.11 |
| Asian American | 5,954,160 | 1.94 | 5,640,250 | 11.17 | 1,851,005 | 4.58 | 4,486,862 | 4.78 | 17,932,277 | 3.65 |
| Hispanic American | 15,093,578 | 4.92 | 1,054,224 | 2.09 | 1,853,839 | 4.59 | 4,698,343 | 5.01 | 22,699,984 | 4.62 |
| Total MBE | 32,417,217 | 10.56 | 7,404,474 | 14.66 | 4,184,844 | 10.35 | 11,921,795 | 12.71 | 55,928,330 | 11.38 |
| Caucasian Female | 7,481,934 | 2.44 | 540,580 | 1.07 | 506,220 | 1.25 | 1,377,947 | 1.47 | 9,906,681 | 2.02 |
| Total M/W/DBE | 39,899,151 | 13.00 | 7,945,054 | 15.73 | 4,691,064 | 11.61 | 13,299,742 | 14.18 | 65,835,011 | 13.39 |
| D&B MWBE | 25,823,685 | 8.41 | 18,194,681 | 36.03 | 2,320,772 | 5.74 | 9,599,110 | 10.24 | 55,938,248 | 11.38 |
| Total | 306,915,480 | 100.00 | 50,495,282 | 100.00 | 40,413,983 | 100.00 | 93,771,375 | 100.00 | 491,596,120 | 100.00 |

Source: BART Procurement, M³ Consulting,

*Bay Area—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Napa, Solano, Sonoma

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Table 6.9.
Construction
Pure Prime + Sub Contract Awards—Detailed
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | Bay Area* | | | | | | | | | |
|----------------------|--------------------|---------------|--------------------|---------------|--------------------|---------------|---------------------|---------------|------------------------|---------------|
| | Pure Prime + Sub | | Pure Prime Only | | Subcontractor Only | | Federal Prime + Sub | | Nonfederal Prime + Sub | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 369,822,861 | 75.23 | 301,152,333 | 89.53 | 68,670,528 | 44.23 | 65,832,363 | 68.95 | 303,990,498 | 76.74 |
| African American | 15,296,069 | 3.11 | 234,500 | 0.07 | 15,061,569 | 9.70 | 2,695,633 | 2.82 | 12,600,436 | 3.18 |
| Asian American | 17,932,277 | 3.65 | 262,530 | 0.08 | 17,669,747 | 11.38 | 6,290,475 | 6.59 | 11,641,802 | 2.94 |
| Hispanic American | 22,699,984 | 4.62 | 2,352,622 | 0.70 | 20,347,361 | 13.11 | 4,301,848 | 4.51 | 18,398,136 | 4.64 |
| Total MBE | 55,928,330 | 11.38 | 2,849,652 | 0.85 | 53,078,677 | 34.19 | 13,287,956 | 13.92 | 42,640,374 | 10.76 |
| Caucasian Female | 9,906,681 | 2.02 | - | 0.00 | 9,906,681 | 6.38 | 3,033,670 | 3.18 | 6,873,011 | 1.74 |
| Total M/W/DBE | 65,835,011 | 13.39 | 2,849,652 | 0.85 | 62,985,358 | 40.57 | 16,321,626 | 17.10 | 49,513,385 | 12.50 |
| D&B MWBE | 55,938,248 | 11.38 | 32,351,458 | 9.62 | 23,586,789 | 15.19 | 13,320,639 | 13.95 | 42,617,609 | 10.76 |
| Total | 491,596,120 | 100.00 | 336,353,443 | 100.00 | 155,242,675 | 100.00 | 95,474,628 | 100.00 | 396,121,492 | 100.00 |

Source: BART Procurement, M³ Consulting,

*Bay Area—Consists of counties of San Francisco, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Napa, Solano, Sonoma

6.6 PROFESSIONAL SERVICES UTILIZATION BASED ON PURCHASE ORDERS

This section examines M/W/DBE utilization by BART purchase orders, which best reflect the procurement activity for Professional Services. Contract awards and payments data are contained in Appendix B. The relevant market for Professional Services is the State of California. For the purposes of this study, both A&E and Construction Management services have been extrapolated from the Professional Services procurement category.

As reflected in Table 6.10, Professional Service purchase orders valued at \$66.67 million were issued by BART for the study period 2011-2014; 12.93 percent of which was to MBEs and 0.54 percent to Caucasian Female-owned firms. D&B MWBEs received 2.36 percent. The majority of the MBE dollars went to African American-owned firms, who received over \$8.2 million, accounting for 12.37 percent overall. Except for 2013, when they received only 4.68 percent of the dollars, African American-owned firms received over 15 percent of the dollars for the other years in the study period. Upon closer examination, however, we see that a majority of these dollars were awarded to one African American-owned firm, who received \$5,759,681 or 69.8 percent of the payments to this MBE group. The Professional Services provided by this firm were related to major Construction projects. The firm received \$3.5 million in 2011, \$1.42 million of the \$1.52 million in 2013 and about half the purchase order amounts (\$723,075) in 2014 as well.

Asian American-owned firms received only 0.19 percent overall or \$128,000. The largest dollars award to Professional Service Asian American vendors in a given year was \$100,000 in 2012. Hispanic American-owned Professional Service firms did not receive \$100,000 or above in any fiscal year in the study period, with a total amount for the four-year study period of \$243,913 or 0.37 percent of the total. Caucasian Female-owned firms reflected similar results as Asian American- and Hispanic American-owned firms, receiving \$362,687 overall, a majority of which was awarded in 2011, after which they steadily declined reaching only \$21,011 during 2014.

About 26 percent of purchase order dollars were awarded on Federal contracts and the remaining 74 percent on Non-federal contracts, as is detailed in Table 6.11. Over 83 percent of contracts in both Federal and Non-federal contracts were to Non-M/W/DBEs. Of the Non-federal dollar awards, M/W/DBEs received 14.66 percent of the monies, as compared to only 10.08 percent of the Federal dollars. Among the MBEs, the majority of the dollars were to African American-owned firms at 8.37 percent in Federal Professional Service purchase orders and 13.77 percent in Non-federal Professional Service purchase orders. However, as discussed above, one African American-owned firm largely received a majority of these awards, with \$869,540 or 60 percent of African American Federal dollars and \$4.89 million

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or 71.9 percent of the Non-federal award dollars. Other MBE groups and Caucasian Female-owned firms received less than 1 percent of the dollars.

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Table 6.10.
Professional Services
Purchase Orders
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | State of California | | | | | | | | | |
|----------------------|---------------------|---------------|-------------------|---------------|-------------------|---------------|------------------|---------------|-------------------|---------------|
| | 2011 | | 2012 | | 2013 | | 2014 | | Total | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 9,268,688 | 66.81 | 8,268,817 | 79.76 | 30,664,056 | 94.10 | 7,911,902 | 80.38 | 56,113,464 | 84.17 |
| African American | 3,571,943 | 25.75 | 1,659,690 | 16.01 | 1,525,116 | 4.68 | 1,490,839 | 15.15 | 8,247,588 | 12.37 |
| Asian American | - | 0.00 | 100,000 | 0.96 | 25,000 | 0.08 | 3,500 | 0.04 | 128,500 | 0.19 |
| Hispanic American | 23,580 | 0.17 | 97,629 | 0.94 | 47,590 | 0.15 | 75,114 | 0.76 | 243,913 | 0.37 |
| Total MBE | 3,595,523 | 25.92 | 1,857,319 | 17.91 | 1,597,706 | 4.90 | 1,569,453 | 15.94 | 8,620,001 | 12.93 |
| Caucasian Female | 232,565 | 1.68 | 39,260 | 0.38 | 69,852 | 0.21 | 21,011 | 0.21 | 362,687 | 0.54 |
| Total M/W/DBE | 3,828,088 | 27.59 | 1,896,579 | 18.29 | 1,667,558 | 5.12 | 1,590,464 | 16.16 | 8,982,688 | 13.47 |
| D&B MWBE | 775,862 | 5.59 | 202,190 | 1.95 | 254,182 | 0.78 | 341,052 | 3.46 | 1,573,285 | 2.36 |
| Total | 13,872,638 | 100.00 | 10,367,586 | 100.00 | 32,585,796 | 100.00 | 9,843,418 | 100.00 | 66,669,437 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

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| Table 6.11. | | | | | | |
|--|------------------------------|---------------|--------------------------------|---------------|-----------------------------------|---------------|
| Professional Services | | | | | | |
| Purchase Orders—Detailed | | | | | | |
| San Francisco Bay Area Rapid Transit District | | | | | | |
| Relevant Market, 2011 – 2014 | | | | | | |
| | State of California | | | | | |
| | Total Purchase Orders | | Federal Purchase Orders | | Nonfederal Purchase Orders | |
| Ethnicity | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 56,113,464 | 84.17 | 14,400,320 | 83.27 | 41,713,143 | 84.48 |
| African American | 8,247,588 | 12.37 | 1,448,236 | 8.37 | 6,799,352 | 13.77 |
| Asian American | 128,500 | 0.19 | 81,095 | 0.47 | 47,405 | 0.10 |
| Hispanic American | 243,913 | 0.37 | 176,379 | 1.02 | 67,534 | 0.14 |
| Total MBE | 8,620,001 | 12.93 | 1,705,710 | 9.86 | 6,914,291 | 14.00 |
| Caucasian Female | 362,687 | 0.54 | 37,216 | 0.22 | 325,471 | 0.66 |
| Total M/W/DBE | 8,982,688 | 13.47 | 1,742,926 | 10.08 | 7,239,762 | 14.66 |
| D&B MWBE | 1,573,285 | 2.36 | 1,149,876 | 6.65 | 423,409 | 0.86 |
| Total | 66,669,437 | 100.00 | 17,293,123 | 100.00 | 49,376,314 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

6.7 OTHER SERVICES UTILIZATION BASED ON PURCHASE ORDERS

This section examines M/W/DBE utilization by BART using purchase orders, which best reflect the procurement activity for Other Services. The relevant market for Other Services is the State of California.

As reflected in Table 6.12, for Other Services, BART let \$17.9 million via purchase orders, \$13.9 million (77.58 percent) of which went to Non-M/W/DBEs, 6.54 percent to MBEs and 0.12 percent to Caucasian Females. D&B MWBEs received 15.77 percent of the dollars. No single MBE group received over 4 percent overall.

African American-owned firms received only \$11,021 in 2011, \$310,450 in 2013 and zero dollars in the other two years of the study period. Similarly, Asian American-owned firms received monies only in 2014, Hispanic American-owned firms only in 2011 and Caucasian Female-owned firms only in 2012.

The \$17.9 million procured in Other Services for BART represented \$10.6 million (59 percent) in Federal purchase orders and \$7.3 million (41 percent) in Non-federal purchase orders, as shown in Table 6.13. MBEs received 6.97 percent of the dollars in Federal Other Service purchase orders and 5.9 percent in Non-federal Other Service purchase orders. Caucasian Female-owned firms received 0.13 percent and 0.09 percent in Federal and Non-federal purchase orders respectively. D&B MWBEs received 20.80 percent of Federal contract dollars and 8.5 percent of Non-federal dollars in Other Service purchase orders.

Table 6.12.
Other Services
Purchase Orders
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | State of California | | | | | | | | | |
|----------------------|---------------------|---------------|------------------|---------------|------------------|---------------|------------------|---------------|-------------------|---------------|
| | 2011 | | 2012 | | 2013 | | 2014 | | Total | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 1,389,857 | 67.65 | 3,633,654 | 86.81 | 5,863,930 | 85.41 | 2,998,019 | 62.57 | 13,885,459 | 77.58 |
| African American | 11,021 | 0.54 | - | 0.00 | 310,450 | 4.52 | - | 0.00 | 321,471 | 1.80 |
| Asian American | - | 0.00 | - | 0.00 | - | 0.00 | 203,444 | 4.25 | 203,444 | 1.14 |
| Hispanic American | 644,744 | 31.38 | - | 0.00 | - | 0.00 | - | 0.00 | 644,744 | 3.60 |
| Total MBE | 655,765 | 31.92 | - | 0.00 | 310,450 | 4.52 | 203,444 | 4.25 | 1,169,659 | 6.54 |
| Caucasian Female | - | 0.00 | 20,769 | 0.50 | - | 0.00 | - | 0.00 | 20,769 | 0.12 |
| Total M/W/DBE | 655,765 | 31.92 | 20,769 | 0.50 | 310,450 | 4.52 | 203,444 | 4.25 | 1,190,428 | 6.65 |
| D&B MWBE | 8,773 | 0.43 | 531,322 | 12.69 | 691,536 | 10.07 | 1,590,151 | 33.19 | 2,821,781 | 15.77 |
| Total | 2,054,395 | 100.00 | 4,185,744 | 100.00 | 6,865,915 | 100.00 | 4,791,614 | 100.00 | 17,897,668 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

*Does not include Wollborg Temporary Services Dollars

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Table 6.13.
Other Services
Purchase Orders—Detailed
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | State of California | | | | | |
|----------------------|-----------------------|---------------|-------------------------|---------------|----------------------------|---------------|
| | Total Purchase Orders | | Federal Purchase Orders | | Nonfederal Purchase Orders | |
| | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 13,885,459 | 77.58 | 7,624,505 | 72.10 | 6,260,954 | 85.51 |
| African American | 321,471 | 1.80 | 20,155 | 0.19 | 301,317 | 4.12 |
| Asian American | 203,444 | 1.14 | 72,550 | 0.69 | 130,894 | 1.79 |
| Hispanic American | 644,744 | 3.60 | 644,744 | 6.10 | - | 0.00 |
| Total MBE | 1,169,659 | 6.54 | 737,448 | 6.97 | 432,211 | 5.90 |
| Caucasian Female | 20,769 | 0.12 | 14,000 | 0.13 | 6,769 | 0.09 |
| Total M/W/DBE | 1,190,428 | 6.65 | 751,448 | 7.11 | 438,979 | 6.00 |
| D&B MWBE | 2,821,781 | 15.77 | 2,199,648 | 20.80 | 622,133 | 8.50 |
| Total | 17,897,668 | 100.00 | 10,575,602 | 100.00 | 7,322,066 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

6.8 PROCUREMENT UTILIZATION BASED ON PURCHASE ORDERS

In the area of Procurement, M/W/DBE utilization is presented in this section using purchase order, with payments and contracts data reflected in Appendix B. The relevant market for Procurement is the Nation.

A total of \$327.7 million was let in BART procurement purchase orders as shown in Table 6.14; 97.3 percent of these dollars went to Non-M/W/DBEs. Only \$4.35 million was awarded to MBEs and \$100,037 to Caucasian Female-owned firms, over the 4-year period, accounting for 1.33 percent and 0.03 percent respectively. Not a single MBE group received over one percent of the dollars. Hispanic American-owned firms received over \$2.66 million in contracts, a majority of which was received in 2011, with only \$7,450 and \$6,036 paid out in 2013 and 2014.

Table 6.15 reflects Procurement Purchases Orders by Federal and Non-federal dollars. We note that Federally funded purchase orders would be exclusively for parts or equipment related to train operations, while Non-federally funded would covered this items, as well as other types of goods and supply items. Federal and Non-federal dollars were almost evenly split between Federal dollars at about \$176 million and Non-federal dollars at \$152 million. Both Federal (98.44 percent) and Non-federal (95.97 percent) Procurement POs were largely paid to Non-M/W/DBEs. Less than \$3.4 million (2.22 percent) and less than \$1 million (0.56 percent) purchase orders were to MBEs in Non-federal and Federal contracts respectively. Caucasian Female-owned firms, in a similar fashion, received 0.04 percent of Non-federal PO dollars and 0.02 percent of Federal PO dollars. About \$2.6 million in Non-federal purchase orders (1.77 percent) were let to D&B MWBEs and \$1.73 million or .98 percent in Federal purchase orders.

Table 6.14.
Procurement
Purchase Orders
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | Nationwide | | | | | | | | | |
|----------------------|-------------------|---------------|-------------------|---------------|-------------------|---------------|--------------------|---------------|--------------------|---------------|
| | 2011 | | 2012 | | 2013 | | 2014 | | Total | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 65,275,053 | 93.70 | 65,795,824 | 98.18 | 86,408,120 | 97.98 | 101,352,112 | 98.57 | 318,831,109 | 97.30 |
| African American | 280,866 | 0.40 | 282,431 | 0.42 | 90,010 | 0.10 | 96,158 | 0.09 | 749,465 | 0.23 |
| Asian American | 346,906 | 0.50 | 124,144 | 0.19 | 229,535 | 0.26 | 233,989 | 0.23 | 934,575 | 0.29 |
| Hispanic American | 2,651,778 | 3.81 | - | 0.00 | 7,450 | 0.01 | 6,036 | 0.01 | 2,665,264 | 0.81 |
| Total MBE | 3,279,550 | 4.71 | 406,575 | 0.61 | 326,996 | 0.37 | 336,184 | 0.33 | 4,349,304 | 1.33 |
| Caucasian Female | - | 0.00 | 69,861 | 0.10 | 24,852 | 0.03 | 5,325 | 0.01 | 100,037 | 0.03 |
| Total M/W/DBE | 3,279,550 | 4.71 | 476,435 | 0.71 | 351,847 | 0.40 | 341,509 | 0.33 | 4,449,342 | 1.36 |
| D&B MWBE | 1,108,091 | 1.59 | 741,063 | 1.11 | 1,430,897 | 1.62 | 1,132,885 | 1.10 | 4,412,935 | 1.35 |
| Total | 69,662,693 | 100.00 | 67,013,323 | 100.00 | 88,190,864 | 100.00 | 102,826,505 | 100.00 | 327,693,386 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

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Table 6.15.
Procurement
Purchase Orders—Detailed
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | Nationwide | | | | | |
|----------------------|-----------------------|---------------|-------------------------|---------------|----------------------------|---------------|
| | Total Purchase Orders | | Federal Purchase Orders | | Nonfederal Purchase Orders | |
| | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 318,831,109 | 97.30 | 173,362,667 | 98.44 | 145,468,442 | 95.97 |
| African American | 749,465 | 0.23 | 189,499 | 0.11 | 559,966 | 0.37 |
| Asian American | 934,575 | 0.29 | 328,117 | 0.19 | 606,458 | 0.40 |
| Hispanic American | 2,665,264 | 0.81 | 464,172 | 0.26 | 2,201,093 | 1.45 |
| Total MBE | 4,349,304 | 1.33 | 981,787 | 0.56 | 3,367,517 | 2.22 |
| Caucasian Female | 100,037 | 0.03 | 32,446 | 0.02 | 67,592 | 0.04 |
| Total M/W/DBE | 4,449,342 | 1.36 | 1,014,233 | 0.58 | 3,435,109 | 2.27 |
| D&B MWBE | 4,412,935 | 1.35 | 1,733,068 | 0.98 | 2,679,867 | 1.77 |
| Total | 327,693,386 | 100.00 | 176,109,968 | 100.00 | 151,583,417 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

6.9 UTILIZATION THRESHOLDS

Below are utilization thresholds presented for each procurement type. Purchase order dollars are utilized to calculate threshold values.

A. A&E Thresholds

A&E Purchase Orders reflected in Table 6.16 shows that across the various thresholds, ranging from 'Below \$10,000' to '\$1.5 million to \$15 million', MBEs receive 17 percent to a little over 23 percent of the total dollars. For BART, an A&E work plan is the same as a purchase order, although purchase orders also may include other A&E agreements. In the two largest ranges of \$1.5 million to \$5 million and \$5 to \$15 million, MBEs received 9.07 percent and 17.15 percent of the dollars. In the latter threshold, \$5 to \$15 million, one African American firms received all of these dollars and in the \$1.5 to \$5 million threshold, one Asian American-owned firm and one African American-owned firm received the MBE dollars. The lowest procurement activity in A&E was from two groups - Caucasian Female-owned firms and Hispanic American-owned firms. Caucasian Female-owned firms' participation in A&E was only in the lowest threshold below \$10,000 and Hispanic American-owned firms did not participate based on purchase order data. African American-owned firms showed procurement activity in every threshold at about 5 percent of the total dollars for that threshold, except 2.28 percent for \$1.5 to 5 million and 17.15 percent in \$5 to \$15 million. Asian American-owned firm procurement activity was in all thresholds at about 13 to 14 percent, except in \$0 to \$10,000 at 20.28 percent and \$5 to \$15 million with no participation.³⁵⁰

B. Construction Thresholds

1. Construction Thresholds Based on Contract Awards

Based on contract awards reflected in Table 6.17, Non-M/W/DBEs received about 40 to 50 percent of total dollars for contract thresholds up to \$500,000 to \$1.5 million. Participation begins to increase in the higher thresholds at about 60 percent, until reaching 100 percent in the Above \$15 million threshold.

M/W/DBEs participated in all thresholds, except Above \$15 million. Asian American-owned firms and Caucasian Female-owned firms received no dollars in the threshold of \$5 million to \$15 million. Asian American- and Hispanic American-owned firms fared best amongst

³⁵⁰ Thresholds based on PDC On-call commitments or payments were not calculated due data disaggregation issues, such as the proper treatment of Project and Administrative Cost.

MBEs in lower thresholds. Hispanic American-owned firms received about 11 to 13 percent in thresholds up to \$500,000 to \$1.5 million, peaking at 23.83 percent for the \$50,000 to \$100,000 threshold. They also reflected the highest participation of MBEs in the threshold of \$5 million to \$15 million. Asian American-owned firms had the highest level of participation among MBEs in the \$0 to \$10,000 and \$10,000 to \$50,000 categories at about 18 percent. Participation began to decline to about 12 percent in the categories of \$50,000 to \$100,000 and \$100,000 to \$500,000, then further to 7.39 percent for \$500,000 to \$1.5 million, before increasing to 10.87 percent for threshold \$1.5 million to \$5 million.

African American-owned firms averaged about 5 to 6 percent participation in all thresholds, except Below \$10,000 (9.38 percent) and \$50,000 to \$100,000 (2.48 percent). Caucasian Female-owned firms had participation at about 7 percent for Below \$10,000 and \$500,000 to \$1.5 million thresholds. Caucasian Female-owned firms' participation was highest in the threshold of \$10,000 to \$50,000 at 17.86 percent, and then decreasing until reaching 2.04 percent for the \$1.5 million to \$5 million threshold. D&B MWBE participation rose steadily from 7.55 percent in the \$0 to \$10,000 threshold to 26.10 percent for the threshold of \$5 million to \$15 million.

2. Construction Thresholds Based on Purchase Orders

In construction purchase orders, which represents prime level contracts only, as noted in Table 6.18, in the lowest threshold, below \$10,000, all groups participate, albeit unevenly, whereas Caucasian Female-owned firms do not have any purchase order activity beyond the \$0 to \$10,000 threshold. Asian American-owned firms only participate in BART contracts below \$50,000 and African American-owned firms' up to \$500,000. Hispanic American-owned construction firms participate in BART contracts up to \$1.5 million to \$5 million. Non-M/W/DBEs participate in all thresholds below and above \$15 million, whereas D&B MWBEs participate in contracts up to Above \$15 million.

C. Professional Services Thresholds

1. Professional Services Based on Contract Awards

Based on contract awards shown in Table 6.19, Non-M/W/DBEs received awards in thresholds up to \$1.5 million to \$5 million. M/W/DBEs received no awards in the thresholds Below \$10,000 and \$50,000 to \$100,000. All M/W/DBEs participated in the threshold of \$10,000 to \$50,000, except Asian American-owned firms and D&B MWBEs and \$100,000 to \$500,000, except African American-owned firms and D&B MWBEs. African American- and Caucasian Female-owned firms were the only M/W/DBEs to receive awards for the thresholds of \$500,000 to \$1.5 million (African American-owned firms at 30.69 percent and Caucasian

Female-owned firms at 8.18 percent) and \$1.5 million to \$5 million (African American-owned firms at 47.36 percent and Caucasian Female-owned firms at 31.67 percent).

2. Professional Services Thresholds Based on Purchase Orders

Non-M/W/DBE firms and African American-owned firms provide BART Professional Services in all thresholds up to \$1.5 million to \$5 million; Non-M/W/DBE firms represented 100 percent of the participation in \$5 and \$15 million, as well. African American-owned firms received their largest levels of participation in the thresholds of \$100,000 to \$500,000 at 23.60 percent and \$500,000 to \$1.5 million at 26.06 percent. Asian American-owned firms received purchase orders only in thresholds of \$100,000 to \$500,000 or lower and their participation in each threshold was less than 1 percent. Hispanic American-owned firms participated only in the thresholds of Below \$10,000 and \$10,000 to \$50,000. Caucasian Female-owned firms receive monies up to \$500,000 to \$1.5 million and their participation never exceeded 2 percent in Professional Services (see Table 6.20).

D. Other Services Thresholds

As can be seen in Table 6.21, while Non-M/W/DBE firms have Other Service purchase orders in all thresholds up to \$1.5 million to \$5 million, their lowest levels of participation were 65.52 percent for the threshold of \$100,000 to \$500,000 and 58.84 percent for the threshold of \$500,000 to \$1.5 million. Overall, MBEs were awarded purchase orders in all thresholds up to \$1.5 million to \$5 million, while Caucasian Female-owned firms have no purchase orders beyond \$50,000. MBEs are unevenly spread over the various thresholds with African American-owned and Asian American-owned firms receiving purchase orders in all thresholds \$500,000 or less. Hispanic American-owned firms received no purchase orders in the lower thresholds, however, they received purchase orders in the \$500,000 to \$1.5 million threshold. D&B MWBE purchase orders span all thresholds, except those greater than \$1.5 million.

E. Procurement Thresholds

Procurement purchase orders by thresholds shows a similarly uneven picture for M/W/DBEs in Table 6.22, with Caucasian Female-owned firms receiving payments only in the two smallest thresholds. African American-owned and Asian owned MBEs as well only have purchase orders in the \$100,000 or less thresholds in Procurement. Hispanic American-owned firms have purchase orders unevenly up to \$1.5 million.

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Statistical Analysis of
M/W/DBE Utilization

Table 6.16. (1 of 2)
Architecture and Engineering Thresholds
Purchase Orders
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | MSA | | | | | | | | | |
|----------------------|------------------|---------------|-------------------|---------------|-------------------|---------------|-------------------|---------------|-------------------|---------------|
| | Below 10K | | 10K-50K | | 50K-100K | | 100K-500K | | 500K-1.5M | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 692,141 | 63.45 | 9,271,825 | 73.98 | 12,760,414 | 73.48 | 41,837,403 | 71.23 | 49,739,141 | 80.88 |
| African American | 36,093 | 3.31 | 651,701 | 5.20 | 774,645 | 4.46 | 4,677,290 | 7.96 | 2,822,969 | 4.59 |
| Asian American | 221,249 | 20.28 | 1,642,699 | 13.11 | 2,486,613 | 14.32 | 8,788,543 | 14.96 | 8,211,834 | 13.35 |
| Hispanic American | - | 0.00 | - | 0.00 | - | 0.00 | - | 0.00 | - | 0.00 |
| Total MBE | 257,342 | 23.59 | 2,294,401 | 18.31 | 3,261,257 | 18.78 | 13,465,834 | 22.92 | 11,034,803 | 17.94 |
| Caucasian Female | 21,465 | 1.97 | - | 0.00 | - | 0.00 | - | 0.00 | - | 0.00 |
| Total M/W/DBE | 278,807 | 25.56 | 2,294,401 | 18.31 | 3,261,257 | 18.78 | 13,465,834 | 22.92 | 11,034,803 | 17.94 |
| D&B MWBE | 119,907 | 10.99 | 966,088 | 7.71 | 1,343,596 | 7.74 | 3,435,988 | 5.85 | 720,317 | 1.17 |
| Total | 1,090,855 | 100.00 | 12,532,314 | 100.00 | 17,365,267 | 100.00 | 58,739,225 | 100.00 | 61,494,261 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

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Statistical Analysis of
M/W/DBE Utilization

Table 6.16 (2 of 2)
Architecture and Engineering Thresholds
Purchase Orders
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | MSA | | | | | |
|----------------------|-------------------|---------------|-------------------|---------------|--------------------|---------------|
| | 1.5M-5M | | 5M-15M | | Total | |
| | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 69,329,961 | 90.93 | 34,852,296 | 82.85 | 217,444,689 | 80.99 |
| African American | 1,741,544 | 2.28 | 7,216,148 | 17.15 | 17,920,391 | 6.67 |
| Asian American | 5,176,489 | 6.79 | - | 0.00 | 26,527,427 | 9.88 |
| Hispanic American | - | 0.00 | - | 0.00 | - | 0.00 |
| Total MBE | 6,918,033 | 9.07 | 7,216,148 | 17.15 | 44,447,818 | 16.55 |
| Caucasian Female | - | 0.00 | - | 0.00 | 21,465 | 0.01 |
| Total M/W/DBE | 6,918,033 | 9.07 | 7,216,148 | 17.15 | 44,469,283 | 16.56 |
| D&B MWBE | - | 0.00 | - | 0.00 | 6,585,896 | 2.45 |
| Total | 76,247,994 | 100.00 | 42,068,444 | 100.00 | 268,499,867 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

Chapter VI
Statistical Analysis of
M/W/DBE Utilization

Table 6.17. (1 of 2)
Construction Thresholds
Pure Prime + Subcontract Awards
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | Bay Area | | | | | | | | | |
|----------------------|----------------|---------------|------------------|---------------|------------------|---------------|-------------------|---------------|-------------------|---------------|
| | Below 10K | | 10K-50K | | 50K-100K | | 100K-500K | | 500K-1.5M | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 75,137 | 46.96 | 866,423 | 47.25 | 1,087,887 | 40.83 | 15,586,301 | 47.78 | 31,969,091 | 53.76 |
| African American | 15,000 | 9.38 | 87,810 | 4.79 | 66,000 | 2.48 | 1,862,401 | 5.71 | 3,584,400 | 6.03 |
| Asian American | 28,906 | 18.07 | 328,272 | 17.90 | 327,275 | 12.28 | 3,956,032 | 12.13 | 4,387,950 | 7.38 |
| Hispanic American | 17,120 | 10.70 | 84,754 | 4.62 | 634,967 | 23.83 | 4,245,113 | 13.01 | 7,515,067 | 12.64 |
| Total MBE | 61,026 | 38.14 | 500,836 | 27.31 | 1,028,242 | 38.59 | 10,063,546 | 30.85 | 15,487,417 | 26.04 |
| Caucasian Female | 11,750 | 7.34 | 327,528 | 17.86 | 371,050 | 13.93 | 3,334,284 | 10.22 | 4,191,620 | 7.05 |
| Total M/W/DBE | 72,776 | 45.49 | 828,364 | 45.17 | 1,399,292 | 52.52 | 13,397,830 | 41.07 | 19,679,037 | 33.09 |
| D&B MWBE | 12,086 | 7.55 | 139,000 | 7.58 | 177,325 | 6.66 | 3,638,331 | 11.15 | 7,820,632 | 13.15 |
| Total | 159,999 | 100.00 | 1,833,787 | 100.00 | 2,664,504 | 100.00 | 32,622,461 | 100.00 | 59,468,759 | 100.00 |

Source: BART Procurement, M³ Consulting

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Statistical Analysis of
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Table 6.17 (2 of 2)
Construction Thresholds
Pure Prime + Subcontract Awards
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | Bay Area | | | | | | | |
|----------------------|-------------------|---------------|--------------------|---------------|--------------------|---------------|--------------------|---------------|
| | 1.5M-5M | | 5M-15M | | Above 15M | | Total | |
| | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 48,142,478 | 58.78 | 65,718,780 | 61.67 | 206,376,764 | 100.00 | 369,822,861 | 75.23 |
| African American | 4,307,517 | 5.26 | 5,372,941 | 5.04 | 0 | 0.00 | 15,296,069 | 3.11 |
| Asian American | 8,903,842 | 10.87 | 0 | 0.00 | 0 | 0.00 | 17,932,277 | 3.65 |
| Hispanic American | 2,542,149 | 3.10 | 7,660,814 | 7.19 | 0 | 0.00 | 22,699,984 | 4.62 |
| Total MBE | 15,753,508 | 19.23 | 13,033,755 | 12.23 | 0 | 0.00 | 55,928,330 | 11.38 |
| Caucasian Female | 1,670,449 | 2.04 | 0 | 0.00 | 0 | 0.00 | 9,906,681 | 2.02 |
| Total M/W/DBE | 17,423,957 | 21.27 | 13,033,755 | 12.23 | 0 | 0.00 | 65,835,011 | 13.39 |
| D&B MWBE | 16,336,043 | 19.95 | 27,814,831 | 26.10 | 0 | 0.00 | 55,938,248 | 11.38 |
| Total | 81,902,479 | 100.00 | 106,567,366 | 100.00 | 206,376,764 | 100.00 | 491,596,120 | 100.00 |

Source: BART Procurement, M³ Consulting

Table 6.18. (1 of 2)
Construction Thresholds
Purchase Orders
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | Bay Area | | | | | | | | | |
|----------------------|------------------|---------------|-------------------|---------------|-------------------|---------------|-------------------|---------------|-------------------|---------------|
| | Below 10K | | 10K-50K | | 50K-100K | | 100K-500K | | 500K-1.5M | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 1,554,174 | 82.20 | 9,727,913 | 78.80 | 12,731,191 | 80.54 | 34,156,837 | 83.28 | 28,935,976 | 63.41 |
| African American | 6,355 | 0.34 | 27,000 | 0.22 | 90,655 | 0.57 | 415,865 | 1.01 | - | 0.00 |
| Asian American | 17,240 | 0.91 | 36,800 | 0.30 | - | 0.00 | - | 0.00 | - | 0.00 |
| Hispanic American | 21,636 | 1.14 | 13,230 | 0.11 | 93,000 | 0.59 | - | 0.00 | 770,000 | 1.69 |
| Total MBE | 45,230 | 2.39 | 77,030 | 0.62 | 183,655 | 1.16 | 415,865 | 1.01 | 770,000 | 1.69 |
| Caucasian Female | 25,458 | 1.35 | - | 0.00 | - | 0.00 | - | 0.00 | - | 0.00 |
| Total M/W/DBE | 70,688 | 3.74 | 77,030 | 0.62 | 183,655 | 1.16 | 415,865 | 1.01 | 770,000 | 1.69 |
| D&B MWBE | 265,763 | 14.06 | 2,539,817 | 20.57 | 2,892,148 | 18.30 | 6,442,550 | 15.71 | 15,929,622 | 34.91 |
| Total | 1,890,626 | 100.00 | 12,344,760 | 100.00 | 15,806,994 | 100.00 | 41,015,252 | 100.00 | 45,635,598 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

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M/W/DBE Utilization

Table 6.18 (2 of 2)
Construction Thresholds
Purchase Orders
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | Bay Area | | | | | | | |
|----------------------|-------------------|---------------|--------------------|---------------|--------------------|---------------|----------------------|---------------|
| | 1.5M-5M | | 5M-15M | | Above 15M | | Total | |
| | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 54,553,547 | 68.14 | 81,815,423 | 72.43 | 741,118,681 | 100.00 | 917,109,027 | 91.56 |
| African American | - | 0.00 | - | 0.00 | - | 0.00 | 539,875 | 0.05 |
| Asian American | - | 0.00 | - | 0.00 | - | 0.00 | 54,040 | 0.01 |
| Hispanic American | - | 0.00 | - | 0.00 | - | 0.00 | 879,741 | 0.09 |
| Total MBE | - | 0.00 | - | 0.00 | - | 0.00 | 1,473,656 | 0.15 |
| Caucasian Female | - | 0.00 | - | 0.00 | - | 0.00 | 25,458 | 0.00 |
| Total M/W/DBE | - | 0.00 | - | 0.00 | - | 0.00 | 1,499,114 | 0.15 |
| D&B MWBE | 25,510,060 | 31.86 | 31,142,999 | 27.57 | - | 0.00 | 83,042,565 | 8.29 |
| Total | 80,063,607 | 100.00 | 112,958,422 | 100.00 | 741,118,681 | 100.00 | 1,001,650,705 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

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Statistical Analysis of
M/W/DBE Utilization

Table 6.19. (1 of 2)
Professional Services Thresholds
Pure Prime + Subcontract Awards
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | State of California | | | | | | | | | |
|----------------------|---------------------|---------------|----------------|---------------|----------------|---------------|------------------|---------------|------------------|---------------|
| | Below 10K | | 10K-50K | | 50K-100K | | 100K-500K | | 500K-1.5M | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 2,254 | 100.00 | 74,831 | 32.51 | 80,000 | 50.00 | 2,111,021 | 74.58 | 5,377,875 | 61.13 |
| African American | - | 0.00 | 79,788 | 34.67 | - | 0.00 | - | 0.00 | 2,699,873 | 30.69 |
| Asian American | - | 0.00 | - | 0.00 | - | 0.00 | 297,000 | 10.49 | - | 0.00 |
| Hispanic American | - | 0.00 | 17,500 | 7.60 | - | 0.00 | 122,465 | 4.33 | - | 0.00 |
| Total MBE | - | 0.00 | 97,288 | 42.27 | - | 0.00 | 419,465 | 14.82 | 2,699,873 | 30.69 |
| Caucasian Female | - | 0.00 | 58,031 | 25.21 | - | 0.00 | 300,000 | 10.60 | 720,000 | 8.18 |
| Total M/W/DBE | - | 0.00 | 155,319 | 67.49 | - | 0.00 | 719,465 | 25.42 | 3,419,873 | 38.87 |
| D&B MWBE | - | 0.00 | - | 0.00 | 80,000 | 50.00 | - | 0.00 | - | 0.00 |
| Total | 2,254 | 100.00 | 230,150 | 100.00 | 160,000 | 100.00 | 2,830,486 | 100.00 | 8,797,748 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

Chapter VI
Statistical Analysis of
M/W/DBE Utilization

| Table 6.19 (2 of 2) | | | | | | |
|--|----------------------------|---------------|---------------|----------|-------------------|---------------|
| Professional Services Thresholds | | | | | | |
| Pure Prime + Subcontract Awards | | | | | | |
| San Francisco Bay Area Rapid Transit District | | | | | | |
| Relevant Market, 2011 – 2014 | | | | | | |
| | State of California | | | | | |
| | 1.5M-5M | | 5M-15M | | Total | |
| Ethnicity | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 2,199,183 | 20.97 | - | 0.00 | 9,845,164 | 43.74 |
| African American | 4,967,552 | 47.36 | - | 0.00 | 7,747,212 | 34.42 |
| Asian American | - | 0.00 | - | 0.00 | 297,000 | 1.32 |
| Hispanic American | - | 0.00 | - | 0.00 | 139,965 | 0.62 |
| Total MBE | 4,967,552 | 47.36 | - | 0.00 | 8,184,177 | 36.36 |
| Caucasian Female | 3,321,360 | 31.67 | - | 0.00 | 4,399,391 | 19.55 |
| Total M/W/DBE | 8,288,912 | 79.03 | - | 0.00 | 12,583,568 | 55.91 |
| D&B MWBE | - | 0.00 | - | 0.00 | 80,000 | 0.36 |
| Total | 10,488,095 | 100.00 | - | 0.00 | 22,508,732 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

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M/W/DBE Utilization

Table 6.20. (1 of 2)
Professional Services Thresholds
Purchase Orders
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | State of California | | | | | | | | | |
|----------------------|---------------------|---------------|------------------|---------------|------------------|---------------|------------------|---------------|-------------------|---------------|
| | Below 10K | | 10K-50K | | 50K-100K | | 100K-500K | | 500K-1.5M | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 1,871,867 | 88.84 | 7,993,736 | 83.39 | 6,306,572 | 86.16 | 7,033,844 | 71.05 | 8,670,456 | 73.94 |
| African American | 16,666 | 0.79 | 463,344 | 4.83 | 582,423 | 7.96 | 2,336,303 | 23.60 | 3,056,456 | 26.06 |
| Asian American | 7,500 | 0.36 | 70,000 | 0.73 | 51,000 | 0.70 | - | 0.00 | - | 0.00 |
| Hispanic American | 30,835 | 1.46 | 213,078 | 2.22 | - | 0.00 | - | 0.00 | - | 0.00 |
| Total MBE | 55,002 | 2.61 | 746,422 | 7.79 | 633,423 | 8.65 | 2,336,303 | 23.60 | 3,056,456 | 26.06 |
| Caucasian Female | 40,198 | 1.91 | 143,484 | 1.50 | 64,912 | 0.89 | 114,093 | 1.15 | - | 0.00 |
| Total M/W/DBE | 95,200 | 4.52 | 889,906 | 9.28 | 698,335 | 9.54 | 2,450,396 | 24.75 | 3,056,456 | 26.06 |
| D&B MWBE | 139,911 | 6.64 | 702,734 | 7.33 | 314,431 | 4.30 | 416,209 | 4.20 | - | 0.00 |
| Total | 2,106,979 | 100.00 | 9,586,376 | 100.00 | 7,319,338 | 100.00 | 9,900,449 | 100.00 | 11,726,912 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

Chapter VI
Statistical Analysis of
M/W/DBE Utilization

Table 6.20 (2 of 2)
Professional Services Thresholds
Purchase Orders
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| | State of California | | | | | |
|----------------------|---------------------|---------------|-------------------|---------------|-------------------|---------------|
| | 1.5M-5M | | 5M-15M | | Total | |
| | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 8,058,246 | 81.80 | 16,303,742 | 100.00 | 56,113,464 | 84.17 |
| African American | 1,792,396 | 18.20 | - | 0.00 | 8,247,588 | 12.37 |
| Asian American | - | 0.00 | - | 0.00 | 128,500 | 0.19 |
| Hispanic American | - | 0.00 | - | 0.00 | 243,913 | 0.37 |
| Total MBE | 1,792,396 | 18.20 | - | 0.00 | 8,620,001 | 12.93 |
| Caucasian Female | - | 0.00 | - | 0.00 | 362,687 | 0.54 |
| Total M/W/DBE | 1,792,396 | 18.20 | - | 0.00 | 8,982,688 | 13.47 |
| D&B MWBE | - | 0.00 | - | 0.00 | 1,573,285 | 2.36 |
| Total | 9,850,642 | 100.00 | 16,303,742 | 100.00 | 66,669,437 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

Chapter VI
Statistical Analysis of
M/W/DBE Utilization

Table 6.21. (1 of 2)
Other Services Thresholds
Purchase Orders
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | State of California | | | | | | | | | |
|----------------------|---------------------|---------------|------------------|---------------|------------------|---------------|------------------|---------------|------------------|---------------|
| | Below 10K | | 10K-50K | | 50K-100K | | 100K-500K | | 500K-1.5M | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 841,877 | 88.04 | 3,709,430 | 91.48 | 2,755,294 | 78.15 | 2,460,461 | 65.52 | 2,126,496 | 58.84 |
| African American | 13,176 | 1.38 | 18,000 | 0.44 | 127,210 | 3.61 | 163,085 | 4.34 | - | 0.00 |
| Asian American | 2,000 | 0.21 | - | 0.00 | 70,550 | 2.00 | 130,894 | 3.49 | - | 0.00 |
| Hispanic American | - | 0.00 | - | 0.00 | - | 0.00 | - | 0.00 | 644,744 | 17.84 |
| Total MBE | 15,176 | 1.59 | 18,000 | 0.44 | 197,760 | 5.61 | 293,979 | 7.83 | 644,744 | 17.84 |
| Caucasian Female | 6,769 | 0.71 | 14,000 | 0.35 | - | 0.00 | - | 0.00 | - | 0.00 |
| Total M/W/DBE | 21,945 | 2.29 | 32,000 | 0.79 | 197,760 | 5.61 | 293,979 | 7.83 | 644,744 | 17.84 |
| D&B MWBE | 92,435 | 9.67 | 313,440 | 7.73 | 572,424 | 16.24 | 1,000,607 | 26.65 | 842,875 | 23.32 |
| Total | 956,257 | 100.00 | 4,054,870 | 100.00 | 3,525,479 | 100.00 | 3,755,047 | 100.00 | 3,614,114 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

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Statistical Analysis of
M/W/DBE Utilization

| Table 6.21 (2 of 2) | | | | |
|--|----------------------------|---------------|-------------------|---------------|
| Other Services Thresholds | | | | |
| Purchase Orders | | | | |
| San Francisco Bay Area Rapid Transit District | | | | |
| Relevant Market, 2011 – 2014 | | | | |
| | State of California | | | |
| | 1.5M-5M | | Total | |
| Ethnicity | \$ | % | \$ | % |
| Non-M/W/DBE | 2,000,000 | 100.00 | 13,885,459 | 77.58 |
| African American | - | 0.00 | 321,471 | 1.80 |
| Asian American | - | 0.00 | 203,444 | 1.14 |
| Hispanic American | - | 0.00 | 644,744 | 3.60 |
| Total MBE | - | 0.00 | 1,169,659 | 6.54 |
| Caucasian Female | - | 0.00 | 20,769 | 0.12 |
| Total M/W/DBE | - | 0.00 | 1,190,428 | 6.65 |
| D&B MWBE | - | 0.00 | 2,821,781 | 15.77 |
| Total | 2,000,000 | 100.00 | 17,897,668 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

Chapter VI
Statistical Analysis of
M/W/DBE Utilization

Table 6.22. (1 of 2)
Procurement Thresholds
Purchase Orders
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | MSA | | | | | | | | | |
|----------------------|-------------------|---------------|-------------------|---------------|-------------------|---------------|-------------------|---------------|-------------------|---------------|
| | Below 10K | | 10K-50K | | 50K-100K | | 100K-500K | | 500K-1.5M | |
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 20,233,081 | 90.18 | 42,840,775 | 94.32 | 30,310,422 | 97.68 | 25,670,787 | 97.60 | 25,677,641 | 90.39 |
| African American | 194,895 | 0.87 | 495,563 | 1.09 | 59,008 | 0.19 | - | 0.00 | - | 0.00 |
| Asian American | 326,395 | 1.45 | 354,602 | 0.78 | 253,578 | 0.82 | - | 0.00 | - | 0.00 |
| Hispanic American | 14,668 | 0.07 | - | 0.00 | 89,286 | 0.29 | 454,729 | 1.73 | 2,106,581 | 7.42 |
| Total MBE | 535,958 | 2.39 | 850,165 | 1.87 | 401,872 | 1.30 | 454,729 | 1.73 | 2,106,581 | 7.42 |
| Caucasian Female | 36,387 | 0.16 | 63,651 | 0.14 | - | 0.00 | - | 0.00 | - | 0.00 |
| Total M/W/DBE | 572,344 | 2.55 | 913,815 | 2.01 | 401,872 | 1.30 | 454,729 | 1.73 | 2,106,581 | 7.42 |
| D&B MWBE | 1,630,606 | 7.27 | 1,666,353 | 3.67 | 316,759 | 1.02 | 177,373 | 0.67 | 621,845 | 2.19 |
| Total | 22,436,031 | 100.00 | 45,420,944 | 100.00 | 31,029,052 | 100.00 | 26,302,888 | 100.00 | 28,406,067 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

Chapter VI
Statistical Analysis of
M/W/DBE Utilization

Table 6.22 (2 of 2)
Procurement Thresholds
Purchase Orders
San Francisco Bay Area Rapid Transit District
Relevant Market, 2011 – 2014

| Ethnicity | MSA | | | | | | | |
|----------------------|-------------------|---------------|-------------------|---------------|--------------------|---------------|--------------------|---------------|
| | 1.5M-5M | | 5M-15M | | Above 15M | | Total | |
| | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-M/W/DBE | 39,775,879 | 100.00 | 30,580,372 | 100.00 | 109,033,960 | 100.00 | 318,831,109 | 97.30 |
| African American | - | 0.00 | - | 0.00 | - | 0.00 | 749,465 | 0.23 |
| Asian American | - | 0.00 | - | 0.00 | - | 0.00 | 934,575 | 0.29 |
| Hispanic American | - | 0.00 | - | 0.00 | - | 0.00 | 2,665,264 | 0.81 |
| Total MBE | - | 0.00 | - | 0.00 | - | 0.00 | 4,349,304 | 1.33 |
| Caucasian Female | - | 0.00 | - | 0.00 | - | 0.00 | 100,037 | 0.03 |
| Total M/W/DBE | - | 0.00 | - | 0.00 | - | 0.00 | 4,449,342 | 1.36 |
| D&B MWBE | - | 0.00 | - | 0.00 | - | 0.00 | 4,412,935 | 1.35 |
| Total | 39,775,879 | 100.00 | 30,580,372 | 100.00 | 109,033,960 | 100.00 | 327,693,386 | 100.00 |

Source: BART PeopleSoft Financial Management Information System, M³ Consulting

6.10 TOP TEN BIDDERS AND AWARDEES

In trying to decipher patterns of utilization of firms by their race, ethnicity and/or gender within each procurement type, the analysis below seeks to determine whether the same awardees repeatedly received BART contracts, as well as the success rate of BART's top ten bidders in obtaining BART contracts.

Table B.178 shows that the top ten A&E bidders include 11 firms that are M/W/DBEs or D&B MWBEs, based on number of times listed as a bidder or sub-bidder. Only three Non-M/W/DBE firms are among the top A&E bidders. Table B.183 in contrast shows that seven Non-M/W/DBE firms, one Asian American-owned firm, one African American-owned firm and two D&B MWBE firms won A&E awards. Amongst the awardees, only one Asian American-owned firm is reflected in the top ten bidders; the remaining top ten awardees are not reflected among the top ten bidders for A&E services.

Seven Non-M/W/DBE firms and seven M/W/DBE firms were among the top ten bidders for BART construction contracts (Table B.179). The top ten awardees (Table B.185) included eight Non-M/W/DBEs and two D&B MWBEs and zero M/W/DBE firms. However, other than one D&B MWBE, no other top ten bidders were among the top ten awardees for construction.

Three African American-owned firms, one Hispanic American-owned firm and a D&B MWBE were among the top ten bidders for Professional Service contracts with BART (see Table B.180). The only M/W/DBE firms among the top ten awardees is an African American-owned firm with \$1.142 million, along with a D&B MWBE firm with \$1.46 million (Table B.184).

Other Services included a Hispanic American-owned firm and two D&B MWBEs, among the top ten bidders. A Hispanic American-owned firm, an African American-owned firm, and two D&B MWBEs, were among the top ten awardees. (Tables B.181 and B.186).

Table B.182 presents top ten bidders in BART procurement contracts and the list includes only one Asian American-owned firm that bid three times and one Caucasian Female-owned firm that bid three times as well. A D&B MWBE firm is the only Non-M/W/DBE firm that was among the top ten awardees in Procurement (Table B.187).

6.11 CONCLUSIONS

Based on the most robust data source for each procurement type—contract awards, purchase orders or payments—M/W/DBEs achieved the highest levels of participation in A&E at 34.60 percent, based on On-call A&E Payments and the lowest levels of participation in Procurement at 1.36 percent.

The level of achievement in A&E is worthy of note, given that there were no race and gender-conscious goals utilized in this procurement category. On the other hand, in Construction, the only procurement category where BART can utilize race and gender-conscious goals on federal contracts, M/W/DBE participation reached only 11.38 percent, even though BART's overall triennial DBE goal was 22 percent for fiscal years 2011-2013 and 23 percent for the years 2014-2016 and despite achieving over 40 percent M/W/DBE participation at the subcontracting level. A key difference between A&E and Construction levels of M/W/DBE participation is Pure Prime participation, 36 percent for A&E M/W/DBE Pure Prime utilization, combined with 32.38 percent for M/W/DBE subcontracting, contrasted with 0.85 percent for Construction M/W/DBE Pure Prime utilization, combined with 40.64 percent for M/W/DBE subcontracting.

When viewing On-call A&E Payments data to On-call A&E Commitments data to see if there are similar trends, it is revealed that African American-owned participation drops from 15.17 percent based on On-call A&E Commitments to 7.39 based on On-call A&E Payments. Asian American-owned firms show the opposite trend, with 16.38 percent participation based on On-call A&E Commitments and 23.39 percent based on On-call A&E Payments.

When reviewing participation by specific MBE group and Caucasian Female-owned firms, Asian American-owned firms had higher participation than African American-owned firms in A&E and Construction, while African American-owned firms were more represented than Asian American-owned firms in Professional Services and Other Services. African American-owned firm participation in Professional Services was significantly higher than all other MWBE groups at 12.37 percent. However, over 60 percent of this participation reflects awards to one African American-owned firm.

Hispanic American-owned firms fared best in Construction at 4.62 percent and Other Services at 3.60 percent. Although their level of participation was greater than the other MBE groups and Caucasian Female-owned firms, it was not significantly so. Caucasian Female-owned firms appear to have the lowest levels of participation, except in Professional Services, where 0.54 percent participation outpaced that of Asian American- and Hispanic

American-owned firms. D&B MWBEs reflected significant levels of participation in the procurement categories of Construction and Other Services.

Table 6.23.
Summary Table - Utilization by Relevant Market
San Francisco Bay Area Rapid Transit District
Relevant Market; 2011 – 2014

| Ethnicity | A&E ^{1,6} | Construction ^{2,5} | Professional Services ^{3,8} | Other Services ^{3,8} | Procurement ^{4,8} |
|--------------------------|--------------------|-----------------------------|--------------------------------------|-------------------------------|----------------------------|
| | % | % | % | % | % |
| Non-M/W/DBE | 61.06 | 75.23 | 84.17 | 77.58 | 97.30 |
| African American | 7.39 | 3.11 | 12.37 | 1.80 | 0.23 |
| Asian American | 23.39 | 3.65 | 0.19 | 1.14 | 0.29 |
| Hispanic American | 1.37 | 4.62 | 0.37 | 3.60 | 0.81 |
| Total MBE | 32.15 | 11.38 | 12.93 | 6.54 | 1.33 |
| Caucasian Female | 2.45 | 2.02 | 0.54 | 0.12 | 0.03 |
| Total M/W/DBE | 34.60 | 13.39 | 13.47 | 6.65 | 1.36 |
| D&B MWBE | 4.35 | 11.38 | 2.36 | 15.77 | 1.35 |
| Total | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 |

Source: BART Purchasing, BART PeopleSoft Financial Management Information System; M³ Consulting

¹ Relevant Market = MSA

² Relevant Market = Bay Area

³ Relevant Market = State of California

⁴ Relevant Market = Nationwide

⁵ Contract Awards data

⁶ On-Call Commitment data

⁷ Accounts Payable data

⁸ Purchase Orders data

CHAPTER 7: STATISTICAL ANALYSIS OF M/W/DBE DISPARITY IN CONTRACTING

7.1 INTRODUCTION

This chapter begins by reporting the statistical evidence of disparities between M/W/DBE availability in the relevant market of the San Francisco Bay Area Rapid Transit District (BART) and M/W/DBE utilization in contract awards, followed by purchase orders and accounts payable. Disparities are analyzed in the industry categories of Architecture and Engineering, Construction, Professional Services, Other Services and Procurement.

M³ Consulting presents the disparity ratios for BART's ready, willing and able (RWASM) availability. For all industries, RWASM availability will consist of firms that have bid for prime contracts awarded by BART during the study period; firms awarded prime contracts during the study period; and, firms that prime contractors have awarded subcontracts during the study period. The measure of availability used to calculate disparity is the BART RWASM availability, Level 3, consisting of bidders, prime awardees and sub awardees.

Utilization for each industry is measured via purchase order, accounts payables and contract award data as maintained by BART's procurement department. The utilization percentage used to calculate the disparity ratios are based on formal and informal purchases by race and gender.

7.2 DISPARITY RATIOS METHODOLOGY

Disparity ratios compare the percentage utilization of various race and gender groups to the percentage availability of these same groups. The disparity ratio is calculated by dividing the former percentage by the latter. A resulting ratio greater than one indicates overutilization; conversely, a ratio less than one indicate underutilization. The methodologies for calculating availability, utilization and disparity, specifically for this study are presented in Chapter IV, Statistical Methodology.

7.3 DISPARITIES IN ARCHITECTURE & ENGINEERING

Table 7.1 shows disparity ratios for Architecture & Engineering based on PDC On-call A&E Payments data. For the period, M/W/DBEs are significantly over utilized, which is largely driven by significant overutilization of Asian American-owned firms. African American, Hispanic American and Caucasian Female-owned firms are significantly underutilized for the period.

African American-owned firms were over utilized in FY 2012 and FY 2013, but still significantly underutilized for the period. Asian American-owned firms were over utilized in FY 2011 and FY 2014.

While Hispanic American-owned firms' availability is lower than other M/W/DBE groups at 3.96 percent (Ch. V, Table 5.9), its utilization is less than half of its availability (Ch. VI, Table 6.4), resulting in significant underutilization for the period and each year. Interestingly, Caucasian Female-owned firms' availability at 7.39 percent is almost equal to African American-owned firms at 7.65 percent, but their utilization is significantly lower (2.65 percent versus 7.39 percent), resulting in significant underutilization in every year, except 2013, as well as for the period. Asian American-owned firm availability and utilization was highest of all M/W/DBEs at 10.29 percent for availability and 23.39 percent for utilization, resulting in significant overutilization.

Table 7.2 reflects disparity ratios based on On-call A&E Payments utilization in greater detail. While the trends are the same for Pure Prime disparity ratios, Subcontractor disparity ratios reflect overutilization for African American, Asian American-owned firms and Non-M/W/DBEs. African American-owned firms also reflect overutilization on Federal contracts, but are significantly underutilized on Non-Federal contracts. Asian American-owned firms are significantly underutilized on Federal contracts, but significantly over utilized on Non-Federal contracts. Hispanic American-owned firms and Caucasian Female-owned firms are underutilized in all sub-categories, Pure Prime, Subcontractor, Federal and Non-federal contracts. Additionally, when comparing On-call A&E Commitments Disparity Ratios reflected in Table 7.3 to On-call A&E Payments Disparity ratios in Table 7, African American-owned firms' overall disparity changes from statistically significant overutilization (1.98(S)) based on Commitments to statistically significant underutilization (0.97(S)) based on Payments. This is reflective of the discussion on Chapter 6, Utilization, wherein African American-owned firms received 7.39 percent in actual payments, while awarded 15.17 percent in work plan commitments. Table 7.4 reflects disparity ratios detail based on On-call A&E Commitments and reflect trends similar to that in Table 7.2.

Chapter VII
Statistical Analysis of M/W/DBE
Disparity in Contracting

Table 7.1
PDC On-Call A&E Pure Prime + Sub Payments Utilization vs. RWASM Availability Level 3
Architecture & Engineering
San Francisco Bay Area Rapid Transit District
Relevant Market; FY 2011-FY 2014

| MSA | | | | | | | | | | |
|-------------------|-------|-------|-------|-------|-------|-------|-------|-------|--------|-------|
| Ethnicity | 2011 | | 2012 | | 2013 | | 2014 | | Period | |
| | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. |
| Non-M/W/DBE | 0.99 | S | 0.98 | S | 0.98 | S | 0.87 | S | 0.98 | S |
| African American | 0.15 | S | 1.86 | S | 3.80 | S | 0.99 | NS | 0.97 | S |
| Asian American | 3.36 | S | 0.92 | S | 0.00 | S | 2.44 | S | 2.27 | S |
| Hispanic American | 0.55 | S | 0.07 | S | 0.00 | S | 0.65 | S | 0.35 | S |
| Total MBE | 1.69 | S | 1.07 | S | 1.30 | S | 1.57 | S | 1.43 | S |
| Caucasian Female | 0.09 | S | 0.61 | S | 1.35 | S | 0.00 | S | 0.33 | S |
| Total M/W/DBE | 1.29 | S | 0.96 | S | 1.31 | S | 1.18 | S | 1.16 | S |
| D&B MWBE | 0.00 | S | 1.32 | S | 0.00 | S | 1.36 | S | 0.55 | S |

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M³ Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;
 Significance is NS and Ratio is Greater than 1—Overutilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically Significant;
 ND: Not Defined

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Statistical Analysis of M/W/DBE
Disparity in Contracting

| Table 7.2 | | | | | | | | | | |
|--|-----------------------------------|--------------|------------------------|--------------|----------------------|--------------|----------------|--------------|--------------------|--------------|
| PDC On-Call A&E Pure Prime + Sub Payments Utilization vs. RWASM Availability Level 3 | | | | | | | | | | |
| Architecture & Engineering--Detailed | | | | | | | | | | |
| San Francisco Bay Area Rapid Transit District | | | | | | | | | | |
| Relevant Market; FY 2011-FY 2014 | | | | | | | | | | |
| MSA | | | | | | | | | | |
| Ethnicity | Pure Prime + Subcontractor | | Pure Prime Only | | Subcontractor | | Federal | | Non-federal | |
| | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. |
| Non-M/W/DBE | 0.98 | S | 0.94 | S | 1.04 | S | 0.97 | S | 0.99 | S |
| African American | 0.97 | S | 0.65 | S | 1.46 | S | 1.95 | S | 0.15 | S |
| Asian American | 2.27 | S | 2.61 | S | 1.73 | S | 0.96 | S | 3.36 | S |
| Hispanic American | 0.35 | S | 0.49 | S | 0.12 | S | 0.11 | S | 0.55 | S |
| Total MBE | 1.43 | S | 1.51 | S | 1.32 | S | 1.13 | S | 1.69 | S |
| Caucasian Female | 0.33 | S | 0.29 | S | 0.39 | S | 0.63 | S | 0.09 | S |
| Total M/W/DBE | 1.16 | S | 1.21 | S | 1.09 | S | 1.00 | NS | 1.29 | S |
| D&B MWBE | 0.55 | S | 0.67 | S | 0.36 | S | 1.21 | S | 0.00 | S |

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M³ Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;
 Significance is NS and Ratio is Greater than 1—Over utilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically Significant;
 ND: Not Defined

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Statistical Analysis of M/W/DBE
Disparity in Contracting

Table 7.3
PDC On-Call A&E Pure Prime + Sub Commitments Utilization vs. RWASM Availability Level 3
Architecture & Engineering
San Francisco Bay Area Rapid Transit District
Relevant Market; FY 2011-FY 2014

| MSA | | | | | | | | | | |
|----------------------|-------------|----------|-------------|----------|-------------|----------|-------------|----------|-------------|----------|
| Ethnicity | 2011 | | 2012 | | 2013 | | 2014 | | Period | |
| | Ratio | Sign. |
| Non-M/W/DBE | 1.01 | S | 0.91 | S | 0.93 | S | 0.95 | S | 0.95 | S |
| African American | 0.12 | S | 3.45 | S | 4.35 | S | 0.83 | S | 1.98 | S |
| Asian American | 3.09 | S | 0.56 | S | 0.05 | S | 2.09 | S | 1.59 | S |
| Hispanic American | 0.80 | S | 0.00 | S | 0.00 | S | 0.97 | NS | 0.43 | S |
| Total MBE | 1.60 | S | 1.43 | S | 1.51 | S | 1.41 | S | 1.48 | S |
| Caucasian Female | 0.16 | S | 0.54 | S | 1.11 | S | 0.06 | S | 0.36 | S |
| Total M/W/DBE | 1.24 | S | 1.21 | S | 1.41 | S | 1.08 | S | 1.20 | S |
| D&B MWBE | 0.00 | S | 0.94 | S | 0.00 | S | 1.09 | S | 0.64 | S |

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M³ Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;
 Significance is NS and Ratio is Greater than 1—Over utilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically Significant;
 ND: Not Defined

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Disparity in Contracting

Table 7.4
PDC On-Call A&E Pure Prime + Sub Commitments Utilization vs. RWASM Availability Level 3
Architecture & Engineering--Detailed
San Francisco Bay Area Rapid Transit District
Relevant Market; FY 2011-FY 2014

| MSA | | | | | | | | | | |
|----------------------|----------------------------|----------|-----------------|----------|---------------|----------|-------------|----------|-------------|----------|
| Ethnicity | Pure Prime + Subcontractor | | Pure Prime Only | | Subcontractor | | Federal | | Non-federal | |
| | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. |
| Non-M/W/DBE | 0.95 | S | 1.06 | S | 0.68 | S | 0.92 | S | 1.01 | S |
| African American | 1.98 | S | 1.93 | S | 2.10 | S | 2.78 | S | 0.12 | S |
| Asian American | 1.59 | S | 1.13 | S | 2.66 | S | 0.95 | S | 3.09 | S |
| Hispanic American | 0.43 | S | 0.35 | S | 0.62 | S | 0.27 | S | 0.80 | S |
| Total MBE | 1.48 | S | 1.24 | S | 2.04 | S | 1.43 | S | 1.60 | S |
| Caucasian Female | 0.36 | S | 0.36 | S | 0.36 | S | 0.44 | S | 0.16 | S |
| Total M/W/DBE | 1.20 | S | 1.02 | S | 1.63 | S | 1.19 | S | 1.24 | S |
| D&B MWBE | 0.64 | S | 0.41 | S | 1.18 | S | 0.92 | S | 0.00 | S |

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M³ Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;

Significance is NS and Ratio is Greater than 1—Over utilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically Significant;

ND: Not Defined

7.4 DISPARITIES IN CONSTRUCTION

For M/W/DBEs in Construction as shown in Table 7.5, there is significant underutilization for the group and for each MBE group and Caucasian Female-owned firms. Asian American-owned firms were significantly over utilized in 2012. There was no other overutilization by any M/W/DBE group in each year of the study period.

When reviewing the more detailed analysis in Table 7.6, the impact of low Pure Prime participation among M/W/DBEs is evident. Based on Subcontracting, all MBE groups and Caucasian Female-owned firms are significantly over utilized. Asian American-owned firms are over utilized under Federal contracts, but the result is not statistically significant. This may reflect the impact of race and gender-conscious DBE goals, as well as the central focus of such efforts to subcontracting. Note for comparison that under A&E, there is significant overutilization at the Pure Prime levels of Asian American-owned firms and the Subcontracting levels for Asian American- and African American-owned firms, although there are no race and gender-conscious goals targeted to either category. Further, based on Ch. VI, Table 6.17, Pure Prime + Subcontract Awards Utilization Thresholds, M/W/DBE participation is higher in many thresholds up to \$15 million than overall utilization used to calculate disparity ratios.

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Statistical Analysis of M/W/DBE
Disparity in Contracting

| Table 7.5 | | | | | | | | | | |
|--|--------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|---------------|--------------|
| Pure Prime + Sub Contract Utilization vs. RWASM Availability Level 3 | | | | | | | | | | |
| Construction | | | | | | | | | | |
| San Francisco Bay Area Rapid Transit District | | | | | | | | | | |
| Relevant Market; FY 2011-FY 2014 | | | | | | | | | | |
| CMSA | | | | | | | | | | |
| Ethnicity | 2011 | | 2012 | | 2013 | | 2014 | | Period | |
| | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. |
| Non-M/W/DBE | 1.17 | S | 0.72 | S | 1.23 | S | 1.12 | S | 1.12 | S |
| African American | 0.76 | S | 0.29 | S | 0.24 | S | 0.60 | S | 0.64 | S |
| Asian American | 0.30 | S | 1.72 | S | 0.71 | S | 0.74 | S | 0.56 | S |
| Hispanic American | 0.72 | S | 0.30 | S | 0.67 | S | 0.73 | S | 0.67 | S |
| Other American | 0.00 | S | 0.00 | S | 0.00 | S | 0.00 | S | 0.00 | S |
| Total MBE | 0.57 | S | 0.80 | S | 0.56 | S | 0.69 | S | 0.62 | S |
| Caucasian Female | 0.54 | S | 0.24 | S | 0.28 | S | 0.33 | S | 0.45 | S |
| Total M/W/DBE | 0.57 | S | 0.69 | S | 0.51 | S | 0.62 | S | 0.58 | S |
| D&B MWBE | 0.86 | S | 3.66 | S | 0.58 | S | 1.04 | NS | 1.16 | S |

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M³ Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;
 Significance is NS and Ratio is Greater than 1—Over utilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically SignificantND: Not Defined

Chapter VII
Statistical Analysis of M/W/DBE
Disparity in Contracting

Table 7.6
Pure Prime + Sub Contract Utilization vs. RWASM Availability Level 3
Construction--Detailed
San Francisco Bay Area Rapid Transit District
Relevant Market; FY 2011-FY 2014

| CMSA | | | | | | | | | | |
|----------------------|----------------------------|----------|-----------------|----------|---------------|----------|-------------|-----------|-------------|----------|
| Ethnicity | Pure Prime + Subcontractor | | Pure Prime Only | | Subcontractor | | Federal | | Non-federal | |
| | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. |
| Non-M/W/DBE | 1.12 | S | 1.33 | S | 0.66 | S | 1.03 | NS | 1.14 | S |
| African American | 0.64 | S | 0.01 | NS | 2.00 | S | 0.58 | S | 0.65 | S |
| Asian American | 0.56 | S | 0.01 | NS | 1.76 | S | 1.02 | NS | 0.45 | S |
| Hispanic American | 0.67 | S | 0.10 | NS | 1.91 | S | 0.66 | S | 0.68 | S |
| Other American | 0.00 | S | 0.00 | NS | 0.48 | S | 0.00 | NS | 0.00 | S |
| Total MBE | 0.62 | S | 0.05 | S | 1.86 | S | 0.76 | S | 0.58 | S |
| Caucasian Female | 0.45 | S | 0.00 | NS | 1.42 | S | 0.71 | S | 0.39 | S |
| Total M/W/DBE | 0.58 | S | 0.04 | S | 1.77 | S | 0.75 | S | 0.55 | S |
| D&B MWBE | 1.16 | S | 0.98 | NS | 1.53 | S | 1.42 | S | 1.09 | S |

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M² Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;
 Significance is NS and Ratio is Greater than 1—Over utilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically Significant;
 ND: Not Defined

7.5 DISPARITIES IN PROFESSIONAL SERVICES

M/W/DBEs are significantly over utilized for the period, based on calculations reflected in Table 7.7. This overutilization is largely driven by significant overutilization of African American-owned firms. Other MBE groups and Caucasian Female-owned firms are significantly underutilized both for the period and in every year. These trends are the same in the more detailed breakdown of Federal and Non-federal disparity ratios reflected in Table 7.8.

While African American-owned availability is slightly higher than other MBE groups and Caucasian Female-owned firms in Ch. V, Table 5.13, their levels of utilization is significantly higher, with all other groups having utilization of about one percent combined as reflected in Ch.6, Table 6.10. However, about 70 percent of African American-owned utilization is by only one African American-owned firm.

| Table 7.7 | | | | | | | | | | |
|---|-------------|----------|-------------|----------|-------------|----------|-------------|----------|-------------|----------|
| Purchase Order Utilization vs. RWASM Availability Level 3 | | | | | | | | | | |
| Professional Services | | | | | | | | | | |
| San Francisco Bay Area Rapid Transit District | | | | | | | | | | |
| Relevant Market; FY 2011-FY 2014 | | | | | | | | | | |
| State of California | | | | | | | | | | |
| Ethnicity | 2011 | | 2012 | | 2013 | | 2014 | | Period | |
| | Ratio | Sign. |
| Non-M/W/DBE | 0.81 | S | 0.97 | S | 1.14 | S | 0.97 | S | 1.02 | S |
| African American | 6.50 | S | 4.04 | S | 1.18 | S | 3.83 | S | 3.12 | S |
| Asian American | 0.00 | S | 0.40 | S | 0.03 | S | 0.02 | S | 0.08 | S |
| Hispanic American | 0.07 | S | 0.39 | S | 0.06 | S | 0.31 | S | 0.15 | S |
| Total MBE | 2.94 | S | 2.03 | S | 0.56 | S | 1.81 | S | 1.47 | S |
| Caucasian Female | 0.55 | S | 0.12 | S | 0.07 | S | 0.07 | S | 0.18 | S |
| Total M/W/DBE | 2.32 | S | 1.54 | S | 0.43 | S | 1.36 | S | 1.13 | S |
| D&B MWBE | 1.01 | NS | 0.35 | S | 0.14 | S | 0.63 | S | 0.43 | S |

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M³ Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;
 Significance is NS and Ratio is Greater than 1—Over utilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically Significant;
 ND: Not Defined

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Table 7.8
Purchase Order Utilization vs. RWASM Availability Level 3
Professional Services--Detailed
San Francisco Bay Area Rapid Transit District
Relevant Market; FY 2011-FY 2014

| State of California | | | | | | |
|----------------------|-------------|----------|-------------|----------|-------------|----------|
| Ethnicity | Total | | Federal | | Non-federal | |
| | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. |
| Non-M/W/DBE | 1.02 | S | 1.01 | S | 1.02 | S |
| African American | 3.12 | S | 2.11 | S | 3.48 | S |
| Asian American | 0.08 | S | 0.19 | S | 0.04 | S |
| Hispanic American | 0.15 | S | 0.42 | S | 0.06 | S |
| Total MBE | 1.47 | S | 1.12 | S | 1.59 | S |
| Caucasian Female | 0.18 | S | 0.07 | S | 0.21 | S |
| Total M/W/DBE | 1.13 | S | 0.85 | S | 1.23 | S |
| D&B MWBE | 0.43 | S | 1.21 | S | 0.16 | S |

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M³ Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;

Significance is NS and Ratio is Greater than 1—Over utilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically Significant;

ND: Not Defined

7.6 DISPARITIES IN OTHER SERVICES

As reflected in Table 7.9, M/W/DBEs are significantly underutilized for the period, while MBEs are significantly over utilized for the period. MBE overutilization is due to significant overutilization of Asian American- and Hispanic American-owned firms. Asian American-owned firm overutilization is caused by overutilization in one year of the study period, FY 2014, with the remainder of the years reflecting no utilization. Similarly, Hispanic American-owned firms' overutilization is caused by overutilization in FY 2011, with no utilization in the other years of the study period. Based on Table 7.10, Hispanic American-owned firms are significantly over utilized on Federal contracts, but had no participation on Non-federal contracts. Asian American-owned firms are over utilized on Non-federal contracts, but their overutilization is not significant, whereas in Federal contracts, they are in parity.

While African American-owned firms were significantly over utilized in Federal contracts and in FY 2013, they are also significantly underutilized for the period. Caucasian Female-owned firms are significantly underutilized in every year of the study period in both Federal and Non-federal contracts.

Table 7.9
Purchase Order Utilization vs. RWASM Availability Level 3
Other Services
San Francisco Bay Area Rapid Transit District
Relevant Market; FY 2011-FY 2014

| State of California | | | | | | | | | | |
|----------------------|-------------|----------|-------------|----------|-------------|----------|-------------|----------|-------------|----------|
| Ethnicity | 2011 | | 2012 | | 2013 | | 2014 | | Period | |
| | Ratio | Sign. |
| Non-M/W/DBE | 0.81 | S | 1.04 | S | 1.02 | S | 0.75 | S | 0.93 | S |
| African American | 0.14 | S | 0.00 | S | 1.20 | S | 0.00 | S | 0.48 | S |
| Asian American | 0.00 | S | 0.00 | S | 0.00 | S | 6.16 | S | 1.65 | S |
| Hispanic American | 22.91 | S | 0.00 | S | 0.00 | S | 0.00 | S | 2.63 | S |
| Total MBE | 5.47 | S | 0.00 | S | 0.77 | S | 0.73 | S | 1.12 | S |
| Caucasian Female | 0.00 | S | 0.37 | S | 0.00 | S | 0.00 | S | 0.09 | S |
| Total M/W/DBE | 4.42 | S | 0.07 | S | 0.63 | S | 0.59 | S | 0.92 | S |
| D&B MWBE | 0.05 | S | 1.37 | S | 1.09 | S | 3.58 | S | 1.70 | S |

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M³ Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;
 Significance is NS and Ratio is Greater than 1—Over utilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically Significant;
 ND: Not Defined

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Table 7.10
Purchase Order Utilization vs. RWASM Availability Level 3
Other Services--Detailed
San Francisco Bay Area Rapid Transit District
Relevant Market; FY 2011-FY 2014

| State of California | | | | | | |
|----------------------|-------------|----------|-------------|-----------|-------------|-----------|
| Ethnicity | Total | | Federal | | Non-federal | |
| | Ratio | Sign. | Ratio | Ratio | Sign. | Ratio |
| Non-M/W/DBE | 0.93 | S | 0.86 | S | 1.02 | S |
| African American | 0.48 | S | 0.05 | S | 1.09 | S |
| Asian American | 1.65 | S | 1.00 | NS | 2.59 | S |
| Hispanic American | 2.63 | S | 4.45 | S | 0.00 | S |
| Total MBE | 1.12 | S | 1.19 | S | 1.01 | NS |
| Caucasian Female | 0.09 | S | 0.09 | S | 0.07 | S |
| Total M/W/DBE | 0.92 | S | 0.98 | NS | 0.83 | S |
| D&B MWBE | 1.70 | S | 2.24 | S | 0.92 | S |

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M³ Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;
 Significance is NS and Ratio is Greater than 1—Over utilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically Significant;
 ND: Not Defined

7.7 DISPARITIES IN PROCUREMENT

All MBE and Caucasian Female-owned firms are significantly underutilized for the period, except Hispanic American-owned firms, whose overutilization is caused by significant overutilization only in FY 2011, based on Table 7.11. There is little to no participation by Hispanic American-owned firms in all other years of the study period. Table 7.12 shows that this Hispanic American participation resulting in overutilization occurred in Non-federal contracting. In reviewing availability in Ch.5, Table 5.17 and utilization in Ch. VI, Table 6.14, no MBE group, as well as Caucasian Female-owned firms, reflected availability or utilization above one percent in the Procurement category.

| Table 7.11 | | | | | | | | | | |
|---|--------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|---------------|--------------|
| Purchase Order Utilization vs. RWASM Availability Level 3 | | | | | | | | | | |
| Procurement | | | | | | | | | | |
| San Francisco Bay Area Rapid Transit District | | | | | | | | | | |
| Relevant Market; FY 2011-FY 2014 | | | | | | | | | | |
| Nationwide | | | | | | | | | | |
| Ethnicity | 2011 | | 2012 | | 2013 | | 2014 | | Period | |
| | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. |
| Non-M/W/DBE | 1.00 | NS | 1.05 | S | 1.05 | S | 1.05 | S | 1.04 | S |
| African American | 0.48 | S | 0.50 | S | 0.12 | S | 0.11 | S | 0.27 | S |
| Asian American | 0.60 | S | 0.23 | S | 0.31 | S | 0.27 | S | 0.35 | S |
| Hispanic American | 6.46 | S | 0.00 | S | 0.02 | S | 0.02 | S | 1.37 | S |
| Total MBE | 2.08 | S | 0.27 | S | 0.16 | S | 0.15 | S | 0.59 | S |
| Caucasian Female | 0.00 | S | 0.15 | S | 0.04 | S | 0.01 | S | 0.04 | S |
| Total M/W/DBE | 1.61 | S | 0.24 | S | 0.14 | S | 0.11 | S | 0.46 | S |
| D&B MWBE | 0.46 | S | 0.32 | S | 0.47 | S | 0.32 | S | 0.39 | S |

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M³ Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;
 Significance is NS and Ratio is Greater than 1—Over utilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically Significant;
 ND: Not Defined

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Table 7.12
Purchase Order Utilization vs. RWASM Availability Level 3
Procurement--Detailed
San Francisco Bay Area Rapid Transit District
Relevant Market; FY 2011-FY 2014

| Nationwide | | | | | | |
|----------------------|-------------|----------|-------------|----------|-------------|-----------|
| Ethnicity | Total | | Federal | | Non-federal | |
| | Ratio | Sign. | Ratio | Ratio | Sign. | Ratio |
| Non-M/W/DBE | 1.04 | S | 1.05 | S | 1.03 | S |
| African American | 0.27 | S | 0.13 | S | 0.44 | S |
| Asian American | 0.35 | S | 0.23 | S | 0.48 | S |
| Hispanic American | 1.37 | S | 0.44 | S | 2.46 | S |
| Total MBE | 0.59 | S | 0.25 | S | 0.98 | NS |
| Caucasian Female | 0.04 | S | 0.03 | S | 0.06 | S |
| Total M/W/DBE | 0.46 | S | 0.20 | S | 0.77 | S |
| D&B MWBE | 0.39 | S | 0.29 | S | 0.52 | S |

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M³ Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;
 Significance is NS and Ratio is Greater than 1—Over utilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically Significant;
 ND: Not Defined

7.8 CONCLUSIONS

Table 7.13 summarizes the disparity ratios discussed in this chapter for each procurement categories at the race/ethnic/gender group level, for BART procurements for the period FY 2011–FY 2014. Based on the foregoing analysis and the summary below, findings of statistically significant disparity are made for the following groups in the following procurement categories:

- Architecture and Engineering—African American-owned firms, Hispanic American-owned firms, Caucasian Female-owned firms;
- Construction—African American-owned firms, Asian American-owned firms, Hispanic American-owned firms, Caucasian Female-owned firms;
- Professional Services—Asian American-owned firms, Hispanic American-owned firms, Caucasian Female-owned firms;
- Other Services—African American-owned firms, Caucasian Female-owned firms;
- Procurement—African American-owned firms, Asian American-owned firms, Caucasian Female-owned firms.

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Table 7.13
Summary Disparity Ratios by Race, Ethnicity and Gender
Utilization vs. RWASM Availability Level 3
San Francisco Bay Area Rapid Transit District
Relevant Market; FY 2011-FY 2014

| Ethnicity | A&E (On-call Payments) | | Construction (Contract Awards) | | Professional Services (Purchase Orders) | | Other Services (Purchase Orders) | | Procurement (Purchase Orders) | |
|----------------------|------------------------------|----------|--------------------------------------|----------|--|----------|---|----------|-------------------------------------|----------|
| | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. | Ratio | Sign. |
| Non-M/W/DBE | 0.98 | S | 1.12 | S | 1.02 | S | 0.93 | S | 1.04 | S |
| African American | 0.97 | S | 0.64 | S | 3.12 | S | 0.48 | S | 0.27 | S |
| Asian American | 2.27 | S | 0.56 | S | 0.08 | S | 1.65 | S | 0.35 | S |
| Hispanic American | 0.35 | S | 0.67 | S | 0.15 | S | 2.63 | S | 1.37 | S |
| Total MBE | 1.43 | S | 0.62 | S | 1.47 | S | 1.12 | S | 0.59 | S |
| Caucasian Female | 0.33 | S | 0.45 | S | 0.18 | S | 0.09 | S | 0.04 | S |
| Total M/W/DBE | 1.16 | S | 0.58 | S | 1.13 | S | 0.92 | S | 0.46 | S |
| D&B MWBE | 0.55 | S | 1.16 | S | 0.43 | S | 1.70 | S | 0.39 | S |

Source: BART Procurement, BART PeopleSoft Financial Management Information System, BART VPTS Data; BART On-Call Data; M³ Consulting
 Significance is S and Ratio is Greater than 1—Statistically Significant Overutilization; Significance is S and Disparity Ratio is Less than 1 –
 Statistically Significant Underutilization;
 Significance is NS and Ratio is Greater than 1—Over utilized, but not Statistically Significant; Significance is NS and Disparity Ratio is Less than 1 –
 Underutilized, but not Statistically Significant;
 ND: Not Defined

CHAPTER 8: CAPACITY AND REGRESSION ANALYSIS

8.1 INTRODUCTION

Disparities as seen in Chapter VII, Statistical Analysis of M/W/DBE Disparities in Contracting are often attributed to differences in capacity of Non-M/W/DBE and M/W/DBE firms. As such, this capacity analysis sought to examine if there were any differences in capacity of firms based on race or gender that could hinder firms from being actually and potentially available to BART.

8.2 CAPACITY ANALYSIS

The analysis of business capacity is complicated by the fact that (1) capacity is difficult to define, (2) capacity is difficult to measure, and (3) once defined and measured, capacity is an elastic concept. Given that proxies of capacity cannot adequately capture the ability of firms through the use of any single measure, M³ Consulting will examine differences in the capacity of firms based on race and gender, using established statistical methods, once a set of variables that measure capacity are controlled for.

8.2.1 CAPACITY ANALYSIS BASED ON AVERAGE EMPLOYEES AND AVERAGE SALES REVENUES FROM DUN & BRADSTREET

Below are measures of sales and employees from firms in the Bay Area, which may be reflective of the capacity, or the lack thereof, of the race, ethnic and gender groups of firms measured by these proxies for capacity. Firms included in the Dun & Bradstreet analysis is refined to those that fall into NAICS code areas utilized by BART.

A. Capacity Based on Number of Employees

Based on Table 8.1, there are a large number of firms in the 0 to 2,500-employee size limit that include MBEs, WBEs and MWBEs in comparable proportion to Non-MWBEs³⁵¹. However, other than Non-MWBEs and one WBE, there are no other firms in the larger size ranges over 2,500 employees, until about 10,000 employees. The 10,000 plus employee

³⁵¹ It is entirely possible that this is due to self-selection bias. Since businesses owned by MWBEs are often smaller and resource constrained and hence may not have the time, the manpower or the awareness, at times, to list on D&B. If they do not choose to be on the list due to any of the aforementioned reasons, this may result in a downward bias of their group's "availability" and any analysis based on this list may be skewed to that extent. In statistics, this downward bias or "self-selection bias" that arises in any situation in which individuals select themselves into or out of a group, causing a biased statistical result may create abnormal or undesirable conditions in the group.

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thresholds include a few MBEs, WBEs and MWBEs, albeit fewer in number compared to Non-MWBEs.

| Table 8.1. | | | | | | | | | | | | |
|--|---------------|--------------|--------------|--------------|---------------|--------------|----------------|--------------|----------------|--------------|----------------|--------------|
| Dun and Bradstreet | | | | | | | | | | | | |
| Capacity Based on Total Number of Employees | | | | | | | | | | | | |
| San Francisco Bay Area, 2014 | | | | | | | | | | | | |
| | 0-25 | | 26-50 | | 51-100 | | 101-200 | | 201-250 | | 251-500 | |
| | # | | # | | # | | # | | # | | # | |
| MBE | 1,647 | 4.05 | 160 | 5.97 | 89 | 6.88 | 37 | 7.03 | 6 | 4.84 | 11 | 4.82 |
| MWBE | 1,367 | 3.36 | 114 | 4.25 | 52 | 4.02 | 18 | 3.42 | 7 | 5.65 | 11 | 4.82 |
| WBE | 3,244 | 7.98 | 201 | 7.50 | 70 | 5.41 | 22 | 4.18 | 7 | 5.65 | 4 | 1.75 |
| Non-MWBE | 34,407 | 84.61 | 2,205 | 82.28 | 1,082 | 83.68 | 449 | 85.36 | 104 | 83.87 | 202 | 88.60 |
| Total | 40,665 | 100.0 | 2,680 | 100.0 | 1,293 | 100.0 | 526 | 100.0 | 124 | 100.0 | 228 | 100.0 |

Source: 2014 Dun & Bradstreet Hoovers Data; M³ Consulting

| Table 8.1 cont. | | | | | | | | | | | | |
|--|------------------|---------------|--------------------|---------------|--------------------|---------------|---------------------|---------------|----------------|---------------|---------------|--------------|
| Dun and Bradstreet | | | | | | | | | | | | |
| Capacity Based on Total Number of Employees | | | | | | | | | | | | |
| San Francisco Bay Area, 2014 | | | | | | | | | | | | |
| | 501-1,000 | | 1,001-2,500 | | 2,501-5,000 | | 5,001-10,000 | | 10,001+ | | Total | |
| | # | % | # | % | # | % | # | % | # | % | # | % |
| MBE | 6 | 5.36 | 2 | 2.94 | 0 | 0.00 | 0 | 0.00 | 15 | 2.74 | 1,973 | 4.26 |
| MWBE | 7 | 6.25 | 1 | 1.47 | 00 | 0.00 | 0 | 0.00 | 7 | 1.28 | 1,584 | 3.42 |
| WBE | 3 | 2.68 | 2 | 2.94 | 1 | 3.45 | 0 | 0.00 | 36 | 6.58 | 3,590 | 7.76 |
| Non-MWBE | 96 | 85.71 | 63 | 92.65 | 28 | 96.55 | 16 | 100.00 | 489 | 89.40 | 39,141 | 84.56 |
| Total | 112 | 100.00 | 68 | 100.00 | 29 | 100.00 | 16 | 100.00 | 547 | 100.00 | 46,288 | 100.0 |

Source: 2014 Dun & Bradstreet Hoovers Data; M³ Consulting

B. Capacity Based on Revenues

If capacity were to be measured using revenues (Tables 8.2), then all groups of firms, MBEs, WBEs, MWBEs and Non-MWBEs are represented in all revenue ranges, including those over \$10 million. So, based on average revenues, there appears to be no differences in capacity based on race or gender groups, although the number and proportion of MWBE firms is smaller, overall. There are only 822 MBE firms, 637 MWBE firms, 1,088 WBE firms compared to 11,366 Non-MWBE firms available with revenues over \$1 million dollars.

| Table 8.2. | | | | | | |
|---|-------------------|---------------|----------------------|---------------|--------------------|--------------|
| Dun and Bradstreet | | | | | | |
| Capacity Based on Total Revenues | | | | | | |
| San Francisco Bay Area, 2014 | | | | | | |
| | \$0-\$100K | | \$100K-\$500K | | \$500K-\$1M | |
| | # | % | # | % | # | % |
| MBE | 41 | 1.54 | 637 | 3.14 | 473 | 5.0 |
| MWBE | 37 | 1.39 | 499 | 2.46 | 411 | 4.4 |
| WBE | 249 | 9.38 | 1439 | 7.10 | 814 | 8.6 |
| Non-MWBE | 2,327 | 87.68 | 17,703 | 87.30 | 7,745 | 82.0 |
| Total | 2,654 | 100.00 | 20,278 | 100.00 | 9,443 | 100.0 |

Source: 2014 Dun & Bradstreet Hoovers Data; M³ Consulting

| Table 8.2 cont. | | | | | | | |
|---|---------------|-------------------|---------------|-------------------|---------------|---------------|---------------|
| Dun and Bradstreet | | | | | | | |
| Capacity Based on Total Revenues | | | | | | | |
| San Francisco Bay Area, 2014 | | | | | | | |
| \$1M-\$5M | | \$5M-\$10M | | > \$10M | | Total | |
| # | % | # | % | # | % | # | % |
| 554 | 5.80 | 141 | 7.18 | 127 | 5.28 | 1973 | 4.26 |
| 462 | 4.84 | 85 | 4.33 | 90 | 3.74 | 1584 | 3.42 |
| 822 | 8.61 | 131 | 6.67 | 135 | 5.62 | 3590 | 7.76 |
| 7,707 | 80.74 | 1,607 | 81.82 | 2,052 | 85.36 | 39,141 | 84.56 |
| 9,545 | 100.00 | 1,964 | 100.00 | 2,404 | 100.00 | 46,288 | 100.00 |

Source: 2014 Dun & Bradstreet Hoovers Data; M³ Consulting

8.2.2 CAPACITY ANALYSIS BASED ON SURVEY DATA

M³ Consulting conducted a survey of firms on the BART vendor registry and Master S/M/W/DBE list to gather capacity data to be used in the regression analysis to examine differences in capacity determined by race, gender, or ethnicity, if any. This pool of firms included firms that have never contracted with BART. The survey design and sampling frame is discussed in Chapter IV, Statistical Methodology.

A. Respondent Demographics:

1. Race, Ethnicity and Gender of Firms

Of 285 respondents, 72 (25.3 percent) were African American-owned firms, 53 (18.6 percent) were Hispanic American-owned firms, 50 (17.5 percent) were Asian American-owned firms, four were Native American-owned firms, 70 (24.6 percent) were Caucasian/White Females, seven were in Other mixed races, and 27 were Non-MWBEs. Two respondents did not identify to any of the above categories. In summary, there were 186 MBEs³⁵², 70 Caucasian Female-owned firms and 27 Non-MWBEs. A total of 121 firms identified as women-owned firms³⁵³ and 160 as male-owned firms. Four respondents did not identify their gender.

2. Number of Respondents Doing Business with BART

Of a total of 285 respondents, 87.4 percent of respondents offered goods or services that BART may procure. However, only 76 (26 percent) had contracted with BART in the past five years, while 217 respondents had contracted with Other Public Sector Agencies within the State of California. In addition, 84 had contracted with public sector agencies outside of the State, and 234 (82.1 percent) had contracts with Private Sector Agencies/companies.

About 28 women-owned firms contracted with BART in the past five years. Similarly, 43 MBEs (23 percent) and 19 Caucasian Female-owned firms (27 percent) contracted with BART over the past five years. In contrast, a majority of women-owned firms and MBEs had contracted with Other Public Sector Agencies within the State of California, 77.7 percent and over 72 percent, respectively. Of women-owned firms, about 84 percent of Caucasian Female-owned firms contracted with public agencies within the State.

Because the pool of 76 firms that have actually contracted with BART is too small to draw definitive conclusions, M³ Consulting can only conduct an analysis on the pool of total respondents that include potential and actually available firms. Therefore, this analysis does

³⁵² Includes minority women-owned firms.

³⁵³ Includes Caucasian Female and minority women-owned firms.

not support drawing conclusions on any disparity outcomes since the sample of respondents is too small to generalize toward the population of all firms. Moreover, on important questions that discussed contracts and awards, the response rate was even smaller overall.

3. Firm Size Based on Number of Employees, Start Up and Initial Capital

Of the 285 respondents, over 66 percent (189 firms) had ten or less employees; another 75 had 50 or less employees and only nine firms had more than 200 employees. Among the 76 firms that did business with BART, 55.3 percent (42 firms) had ten or less employees. Another 24 (31.6 percent) had less than 50 employees, 6 (7.9 percent) had 51-200 employees and 3 firms (3.9 percent) had more than 200 employees and one firm with over 1000 employees. Two hundred and sixty-three respondent firms (over 92 percent) were start-ups. Sixty-nine of seventy-six firms (or 90.8 percent) that did business with BART were startups. Over 91.9 percent of MWBEs and 95.7 percent of Caucasian female-owned firms were start-ups. Corresponding numbers (percent) for firms that did business with BART was 38 (88.4 percent) MWBEs and 18 (94.7 percent) Caucasian Female-owned firms.

Overall, there were 86 firms (49.7 percent) with less than \$10,000 in initial capital, 124 firms (22 percent) with less than \$25,000 in initial capital and 162 firms (93.6 percent) with less than \$100,000 in initial capital. 112 (39.3 percent) of survey respondents did not address this question. Of 37 (of 76) respondents who did business with BART, 16 (43.2 percent) had less than \$10,000 in initial capital and 10 (27 percent), less than \$100k in initial capital. Only one firm had over \$100,000, but less than \$250,000 in initial capital. Thirty-nine firms did not respond.

Among MWBEs, over 45 percent had less than \$10,000 in start-up funds and 94 percent less than \$100,000; among Caucasian Female-owned firms, 52 percent had less than \$10,000 in start-up funds and 91 percent less than \$100,000 in start-up monies. Among the firms that did business with BART, 29.2 percent (7 of 24 firms) of MWBEs and among Caucasian Female-owned firms, 60 percent (6 of 10 firms) had less than \$10,000 in initial capital; 70.8 percent (17 firms) of MWBEs and 30 percent of Caucasian Female-owned firms had less than \$100,000 in initial capital. Only 3 Non-MWBEs who did business with BART responded to this question.

4. Education and Experience of Respondents

Of the 173 who responded to this question, about 129 (75 percent) consisted of firms with college educated principals; 51 percent (146 of 173) have experience in the profession represented by their current company's specialization, with over 70 percent (103 of 146 who responded to this question) having over ten years of experience. About half of the respondents'

principals have over ten years of prior managerial or supervisory experience. Furthermore, over 30.6 percent of those who responded have relevant experience with the private sector, 6.9 percent with the public sector and over 56 percent with both public and private sectors.

Except for one firm out of 44 Caucasian Female-owned firms, the principals had some college education. A majority of Caucasian Female-owned firms (86 percent) had been in the same profession, at least 60 percent had worked for over ten years in their current profession and 84 percent had prior managerial or supervisory experience. Among MWBEs, 91 percent of the principals had some college education, 84 percent had been the same profession, at least 74 percent had worked for over ten years in their current profession and 82 percent had prior managerial or supervisory experience.

Among those that had done business with BART, 17 of 24 (70.8 percent) MWBEs had a bachelor's degree or higher and 21 (87.5 percent) had some college or higher; 9 of 10 (90 percent) of Caucasian Female owned firms had a bachelor's degree or higher and all 100 percent of Caucasian Female respondents had some college or higher. Seventy three percent (27 of 37 respondents) of those who did business with BART had experience in the profession represented by their company's specialization. Among the 27, these included 18 MWBE firms, 6 Caucasian Female-owned firms; 12 of 18 MWBEs and 4 of 6 Caucasian Female-owned firms had principals with over 10 years of experience in the profession.

5. Type of Firm

Approximately 34 percent of the respondents were corporations and 27 percent were Subchapter S corporations. Close to 20 percent of respondents were sole proprietorships and an additional 17.5 percent were partnerships or LLCs. Of the 76 BART participatory respondents, 9 (11.8 percent) were Sole proprietorships, 7 (9.2 percent) are partnerships or LLC, 23 (30.3 percent) are Subchapter S corporations and 37 (48.7 percent) are corporations. Ninety-five firms (33 percent) were in Professional Services, 46 firms (16 percent) were in Construction; 13 firms (5 percent) in Construction Management; 28 firms (10 percent) were Suppliers of goods/commodities; 22 firms (8 percent) in A&E; and 16 firms (6 percent) in Technical Services and Other Non-Professional Service. Sixty-five firms (23 percent) represented Other Industries.

Among women respondents, 56 firms were in Professional Service (46 percent), followed by 29 firms in Other Services (24 percent). About 9 percent were in Construction, 3 percent in A&E, 4 percent in Construction Management and 3.3 percent in Technical and Other Non-professional Services. Similarly, a plurality (60 or 32 percent) of 186 MWBE respondents were in Professional Services, followed by 46 Construction firms (24.7 percent), eight (4 percent) of which were in Construction management. MBEs also included 36 (19 percent)

Other Service firms, 17 (9 percent) Procurement firms, 16 (8.6 percent) A&E firms, and the remaining 11 (6 percent) were in Technical Services or Other Non-Professional Services. The 70 Caucasian Female respondents included 31 (44 percent) Professional Service firms, followed by 17 (24 percent) in Other Industries. Six (9 percent) Construction firms and three (4 percent) Construction management firms, seven (10 percent) Procurement firms and three (4 percent) A&E firms were among the other Caucasian Female-owned firms who responded to the survey.

Sixty-eight (23.9 percent) of respondent firms had gross revenues less than \$100,000, whereas 72 firms (25 percent) had revenues between \$100,000 and less than \$500,000. Among MWBEs, 30 percent made less than \$100,000 and 55 percent less than \$500,000, but 32 percent of MWBEs firms had revenues over \$1 million. Over 36 percent of Caucasian Female-owned firms had gross receipts over \$1 million and 17 percent made less than \$100,000, while 42 percent had gross receipts less than \$500,000. Among the 76 respondents who did business with BART, 5.3 percent had less than \$100,000 in gross revenues and 21.1 percent had less than \$500,000 in revenues. Over 55 percent of firms had revenues over \$1 million and 11.8 percent over \$10 million.

B. Financing

1. Bond and Line of Credit Denial Rates

Out of 285 respondents, 64 firms responded that they had applied for a bond. About 20 percent of these 64 firms had been denied a bond at least once in the past five years. This pool of rejected firms did not include any Caucasian Female-owned firms. Of the 119 who applied for a loan/line of credit, a little over 30 percent have been denied at least once.

Isolating MBEs, at least 16.3 percent of those who applied for a bond were denied once and 10 percent were denied two or more times. In comparison, both Caucasian Female-owned firms and Non-MWBEs who applied for bonds were never denied a bond application, although the responses were too few to generalize to the population. At least 15.9 percent of MWBEs were denied a loan one time, whereas 22.7 percent of MBEs who applied for a loan/line of credit were denied two or more times. Corresponding figures for Caucasian Female-owned firms showed that about 9.5 percent of firms were denied a loan one time and two times each, but over 81 percent were never denied a loan. The picture is almost identical for Non-MWBEs.

2. Hindrances to Obtaining Bonds, Loans and Lines of Credit

About 30 firms of 119 (25 percent) found the bank manager's attitude problematic, while 19 firms (16 percent) found the loan application process problematic and 11 firms (9.2 percent)

found the pricing or rate charged as prohibitive in securing a loan or line of credit. At least 27.3 percent of MBE respondents, 23.8 percent of Caucasian Female respondents and only about 10 percent of Non-MWBEs report bank manager attitude as a hindrance in obtaining a loan. About 15.9 percent of MBEs and 23.8 percent of Caucasian Female-owned firms also found the loan application process as a hindrance to securing a loan. Despite these obstacles, two Non-MWBE firms had over \$10 million bond in the past five years and at least two Non-MWBEs and seven MWBEs had bonding for over \$2.5 million.

3. Utilization of Government Assistance and Financial Programs

Of 64 respondents, only two firms used government assistance programs, two firms used microloan programs, and three firms used bond programs as a means of financing. Over 17.2 percent (11 firms) used Small business loan programs and two firms used 'Other' financing programs with 44 of 64 firms (68.8 percent) using none of these options to finance their firms. Among MWBEs, about 20 percent used Small business loan programs, two firms each (4.1 percent) used Government assistance programs, bond programs and micro loan programs respectively. Thirty two of 49 MWBEs did not use any of programs to obtain financing for their firms.

C. Bidding

1. Firms that Bid as a Prime Contractor

Of the 285 respondents, in the past two years, 64 firms (22.6 percent) bid on BART contracts as a prime contractor, 112 firms (39.6 percent) bid with Other Public Sector Agencies in California, 13 firms (4.6 percent) bid in public sector agencies outside the State and 25 firms (8.8 percent) bid on contracts with the private sector; 69 firms (25 percent) did not bid in any of these aforementioned categories. The pattern among MBEs does not vary much from the overall picture, but Caucasian Female-owned firms bid more often at other Public sector agencies than at BART (45.7 percent compared to 15.7 percent respectively). However, about 40.7 percent of Non-MWBE respondents bid with BART, whereas only 25.9 percent bid with other Public sector agencies within the State.

Among 253 respondents, majority of the bids fell into ranges lower than \$2.5 million, and were almost evenly spread across various bid ranges. Only one Non-MWBE respondent and six MBEs³⁵⁴ bid in the \$2.5 million to \$5 million range and only one Non-MWBE respondent and three MBEs bid in the \$10 million or greater range. One Caucasian Female-owned firm bid in the \$5 million to \$10 million range.

³⁵⁴ Includes minority women-owned firms

2. Firms that Bid as a Subcontractor

Seventy-five companies among the respondents bid for BART contracts as a subcontractor (sub consultant) in the past two years; these included 45 MBEs, 20 Caucasian Female-owned firms and 10 Non-MWBE vendors. For MBEs, a majority of sub bidding activity was with BART (24.2 percent) or Other Public Sector agencies within the State (41.4 percent). Caucasian Female-owned firms and Non-MWBEs also had a similar pattern of bidding, with 28.6 percent and 37 percent of the sub bidding with BART and 38.6 percent and 22.2 percent of sub bidding with Other Public sector agencies in California, respectively.

D. Contract Awards

1. Firms that Won as a Prime Contractor

In the past two years, of 214 respondents that won contracts, 27 firms (13 percent) won a contract with BART as a prime contractor, 102 firms (47.7 percent) with Other Public Sector Agencies in California, ten firms (4.7 percent) with Other Public Sector Agencies outside California, 39 firms (18.2 percent) with Private Sector Agencies and 36 firms (17 percent) with none of these aforementioned agencies/companies. Only 16 (11.3 percent) of 141 MBEs won prime contracts with BART in the past two years, whereas 32 MBEs won private sector contracts and 63 MBEs won contracts with Other Public Sector Agencies for the same period. Of 53 Caucasian Female respondents who won contracts, four were with BART, 32 firms won contracts with Other Public Sector Agencies and 3 firms won in the private sector.

2. Firms that Won as a Subcontractor

The 212 respondents who won subcontracts in the past two years included 55 Caucasian Female owned firms, 138 MBEs and 19 Non-MWBEs. MBEs won 17.4 percent of subcontracts with BART, 44.9 percent with Other Public Sector Agencies in the State and 20.3 percent from the private sector. Only 5 percent of contracts were from public sector agencies outside of the State and 28 elsewhere. Caucasian Female-owned firms showed a similar pattern of subcontract awards from BART and other Public and Private Sector agencies. Of those that responded, Non-MWBEs largely won subcontracts from BART followed by other Public sector agencies in California.

3. Firms Awarded Contracts and Subcontracts with BART

In the past two years, only 27 firms responded as having been awarded a contract as a prime contractor (consultant) with BART. MBEs received these evenly through the small and large dollar ranges, with three MBEs in the less than \$25,000 range to three MBEs in the \$2.5 million to \$5 million range and one MBE received a contract in the \$10 million and over range as well. Among the respondents, Caucasian Female-owned firms did not receive any contracts

over \$100,000. However, the low level of response to this question limits any generalization of these patterns to the populations overall.

For those firms who won subcontracts with BART, a majority (27 of 44) of the subcontracts were won within ranges up to \$250,000. However, 4 MBEs received subcontracts in the \$250,000 to \$500,000 range, 4 in the \$500,000 to \$1 million range and 4 in the \$1 million to \$2.5 million range, with one MBE each winning in the \$2.5 million to \$5 million and over \$10 million range. Caucasian Female-owned firms won two subcontracts in each of the lower end ranges of Less than \$25,000 and \$25,000 to \$50,000 and 5 in the \$100,000 to \$500,000 ranges, with one Caucasian Female-owned firm winning contracts with BART in the \$1 million to \$2.5 million and \$2.5 million to \$5 million range.

4. Firms Awarded Contracts and Subcontracts in the Private Sector

In contrast to BART contracts, of 123 respondents who won contracts with the private sector, 75 were MBEs, 31 were Caucasian Female-owned firms and 17 were Non-MWBEs. MBEs received contracts in almost every dollar range category winning about 15 contracts or 20 percent of private sector contracts over \$1 million. Caucasian Female owned firms showed a similar pattern with at least eight contracts or 25.8 percent of private sector contracts over \$1 million. One MBE and two Non-MWBEs won contracts over \$10 million in the private sector.

Of the 116 firms, 66 MBEs, 35 Caucasian Female-owned firms and 15 Non-MWBEs received private sector subcontracts. At least 15 MBEs (22.7 percent), ten Caucasian Female owned firms (28.6 percent) and four Non-MWBEs (26.6 percent) of respondents received over \$1 million in subcontracts from the private sector. Further, at least one MBE, three Caucasian Female owned firms and one Non-MWBE firm received over \$10 million in subcontract awards from private sector contracts.

5. Contracts by Type of Public Agency

Among the public-sector agencies in California, the respondents won the most contracts in the area of Transportation (55 or 40.7 percent), followed by cities/municipalities (36 or 26.7 percent), schools (14 or 10.4 percent), utilities (13 or 9.6 percent) and 12 (or 8.9 percent) in others. MBEs and Caucasian Female owned firms followed the same pattern winning majority of the contracts in Transportation followed by Cities/municipalities.

Based on the preceding survey data, M³ Consulting conducted the t-test and regression analysis below.

E. T-Tests of Difference in Mean Capacities

In this section, we discuss each of the capacity variables, and report any statistically significant differences among the various ethnic groups. Four variables from the survey were used as proxy measures of capacity of the firms: start-up monies, years in business, number of full-time employees and gross receipts. Statistical significance of the survey results is measured based on two statistical procedures: (1) t-tests of difference in means; and (2) multiple regression analysis. T-tests were conducted to study differences in means of each of the three capacity variables, between MWBEs and Non-MWBEs.

On average, women-owned firms are statistically significantly younger, but do not have significantly lower start-up capital as well as gross receipts. There is also no significant difference in the number of times women-owned firms apply for a bond than their male counterparts, but women-owned firms are denied a bond significantly fewer times on average. Women-owned firms are denied more often on loans or lines of credit, although this difference is not statistically significant.

| Table 8.3. T-Test of Difference in Means Among Women-owned Firms and Others | | | | | | |
|---|----------------------|----------|-------------|----------|------------------------|--------------------|
| | | N | Mean | t | Sig. (2-tailed) | Significant |
| How many full-time, full-year employees does your company have presently across all locations it controls and operates? | Non-women-owned firm | 160 | 1.5438 | | | |
| | Women Owned firm | 121 | 1.3388 | 2.405 | 0.0169 | Yes |
| Company Age | Non-women-owned firm | 160 | 20.7688 | | | |
| | Women Owned firm | 121 | 15.4298 | 3.415 | 0.0007 | Yes |
| Start-up or not | Non-women-owned firm | 160 | 0.9250 | | | |
| | Women Owned firm | 121 | 0.9339 | -0.288 | 0.7735 | No |
| Which of the following categories best describes you company's total gross receipts from all sources for Fiscal Year (FY) 2014? | Non-women-owned firm | 160 | 4.5188 | | | |
| | Women Owned firm | 121 | 4.0331 | 1.558 | 0.1203 | No |
| How many times in the past 5 years has your company applied for a bond? | Non-women-owned firm | 48 | 20.1042 | | | |
| | Women Owned firm | 16 | 7.6875 | 1.302 | 0.1984 | No |
| How many times in the past 5 years has your | Non-women-owned firm | 48 | 0.4583 | | | |

Chapter VIII Capacity and Regression Analysis

| | | | | | | |
|--|----------------------|----|--------|--------|--------|-----|
| company been denied for a bond? | Women Owned firm | 16 | 0.0625 | 2.453 | 0.0171 | Yes |
| How many times in the past 5 years has your company applied for a loan/line of credit? | Non-women-owned firm | 76 | 2.4079 | | | |
| | Women Owned firm | 41 | 2.5854 | -0.341 | 0.7343 | No |
| How many times in the past 5 years has your company been denied for a loan/line of credit? | Non-women-owned firm | 76 | 0.6842 | | | |
| | Women Owned firm | 41 | 0.9268 | -0.677 | 0.5015 | No |

Source: M³ Consulting

Shaded cells are all average of ranges and not real averages.

MBEs and women-owned firms have significantly fewer full-time employees (FTEs) than Non-MWBEs. In terms of age of the firm, MBEs and WBEs have been in business 16 and 17 years respectively on average compared to Non-MWBEs that have been in business 39 years on average. The differences between the MBE and WBE groups in comparison to Non-MWBEs are statistically significantly different.

While start-up monies are not significantly different between the groups, the gross receipts between MBEs are significantly smaller than Non-MWBEs as are WBES from Non-MWBEs.

MWBEs apply almost half the times that Non-MWBEs apply for bonds, however, they are denied significantly more often, as is the case for loans/line of credit. On average, MWBEs apply about 2.5 times for a loan/line of credit, whereas Non-MWBEs apply 3.5 times but the former group is rejected at least once, whereas Non-MWBEs significantly less often. When WBEs are compared to Non-MWBEs, the former applies much fewer times for a bond, but more often for a loan/line of credit, much like MBEs, but WBEs did not get denied for bonds, whereas they did were rejected for loans more often than Non-MWBEs, but the difference is not statistically significant.

| Table 8.4. T-Test of Difference in Means Among MBEs And Non-MWBES | | | | | | |
|---|------------------|----------|-------------|----------|------------------------|---------------------|
| | | N | Mean | t | Sig. (2-tailed) | Significance |
| How many full-time, full-year employees does your company have presently across all locations it controls and operates? | Non-MWBES | 27 | 2.41 | | | |
| | MBE | 186 | 1.35 | 3.949 | .000 | Yes |
| Company Age | Non-MWBES | 27 | 38.7778 | | | |
| | MBE | 186 | 16.1452 | 5.540 | .000 | Yes |
| Which of the following categories best describes your company's total initial capital investment for startup? | Non-MWBES | 8 | 2.50 | | | |
| | MBE | 121 | 3.02 | -1.481 | .173 | No |
| Which of the following categories best describes you company's total gross receipts from all sources for Fiscal Year (FY) 2014? | Non-MWBES | 27 | 6.70 | | | |
| | MBE | 186 | 3.90 | 5.342 | .000 | Yes |
| How many times in the past 5 years has your company applied for a bond? | Non-MWBES | 8 | 30.38 | | | |
| | MBE | 49 | 16.14 | .714 | .491 | No |
| How many times in the past 5 years has your company been denied for a bond? | Non-MWBES | 8 | 0.00 | | | |
| | MBE | 49 | .47 | -3.213 | .002 | Yes |
| How many times in the past 5 years has your company applied for a loan/line of credit? | Non-MWBES | 10 | 3.50 | | | |
| | MBE | 88 | 2.48 | .541 | .601 | No |
| How many times in the past 5 years has your company been denied for a loan/line of credit? | Non-MWBES | 10 | .10 | | | |
| | MBE | 88 | .94 | -3.982 | .000 | Yes |

Source: M³ Consulting

| Table 8.5. T-test of difference in means among Caucasian Female-owned firms and Non-MWBEs | | | | | | |
|---|------------------------------|----------|-------------|----------|------------------------|---------------------|
| | | N | Mean | t | Sig. (2-tailed) | Significance |
| How many full-time, full-year employees does your company have presently across all locations it controls and operates? | Non-MWBEs | 27 | 2.41 | | | |
| | Caucasian Female-owned firms | 70 | 1.34 | 3.946 | .000 | Yes |
| Company Age | Non-MWBEs | 27 | 38.7778 | | | |
| | Caucasian Female-owned firms | 70 | 17.0143 | 5.197 | .000 | Yes |
| Which of the following categories best describes your company's total initial capital investment for startup? | Non-MWBEs | 8 | 2.50 | | | |
| | Caucasian Female-owned firms | 44 | 2.98 | -1.184 | .254 | No |
| Which of the following categories best describes you company's total gross receipts from all sources for Fiscal Year (FY) 2014? | Non-MWBEs | 27 | 6.70 | | | |
| | Caucasian Female-owned firms | 70 | 4.41 | 4.033 | .000 | Yes |
| How many times in the past 5 years has your company applied for a bond? | Non-MWBEs | 8 | 30.38 | | | |
| | Caucasian Female-owned firms | 7 | 7.71 | 1.240 | .252 | No |
| How many times in the past 5 years has your company been denied for a bond? | Non-MWBEs | 8 | 0.00 | | | |
| | Caucasian Female-owned firms | 7 | 0.00 | | | |
| How many times in the past 5 years has your company applied for a loan/line of credit? | Non-MWBEs | 10 | 3.50 | | | |
| | Caucasian Female-owned firms | 21 | 1.86 | .867 | .408 | No |
| How many times in the past 5 years has your company been denied for a loan/line of credit? | Non-MWBEs | 10 | .10 | | | |
| | Caucasian Female-owned firms | 21 | .29 | -1.077 | .290 | No |

Source: M³ Consulting
t cannot be computed because the standard deviations of both groups are 0

8.3 MULTIVARIATE REGRESSION ANALYSIS BASED ON SURVEY DATA

While survey data presents differences in capacities of S/M/W/DBEs and Non-MWBEs using t-tests of differences in means, other social science research suggests multiple factors, including race and gender, may affect firm revenues. Multivariate regression analysis may help analyze variables, including race and gender, which can affect a firm's success.

In this analysis, firm success is measured utilizing two regressions. In the first regression, firm success is measured utilizing gross revenues as the dependent variable in line with social science research³⁵⁵ to examine if after accounting for firm capacity, demographic characteristics, such as race and gender, would statistically explain any variation in firm's gross revenues. "Gross revenues," however, is often a measure of firm capacity as well as an estimation of utilization and so in the second regression, M³ Consulting uses it as a determinant to study the relation between race, ethnicity and gender to the number of times a bid is won as a prime contractor after controlling for the capacity variables³⁵⁶. We present the results of the regressions below.

8.3.1 GROSS REVENUES REGRESSION

For this analysis, the dependent variable (the variable to be explained) is defined as "firm's past year's gross revenues". In conducting surveys, however, M³ Consulting has often found that firms tend to resist the idea of releasing precise dollar figures, but are more responsive when inquiries are made about revenues as dollar ranges. Accordingly, to increase response rate, we utilized nine company gross receipt revenue categories, ranging from "Under \$100,000" as Category 1 to "Over \$10 million" as Category 9. For the regression, the rank of each revenue category (1 through 9) is used as the revenue data observations for each firm.

For the independent variables that may explain variation in gross revenues, the following variables were included:

- **Number of full-time employees:** This variable is a proxy for size of a firm in that, the more employees a company has, the greater volume it is likely to generate, resulting in higher revenues.

³⁵⁵ Bates, Timothy, "The declining status of minorities in the New York City Construction Industry," Reprinted from Economic Development Quarterly, Vol 12, No. 1, Feb 1998, 88-100. "Race and Gender Discrimination across Urban Labor Markets," 1996., Ed. Susan Schmitz. Garland Publishers, New York, NY, p 184. Becker, Gary, The Economics of Discrimination, 1971, 2nd ed. The University of Chicago Press, Chicago.

³⁵⁶ While capacity may be measured by many variables, based on previous studies in the area such as past gross receipts, start-up capital, bonding, insurance and loans available, years in business, number of full-time employees, among others, M³ Consulting was constrained to only include those for which there were sufficient observations to draw any statistical inference.

- **Years in business:** This is a proxy for experience of a firm. It may be argued that a company's longevity is an indicator of success and increased business, thus generating increased revenues.
- **Owner's education:** The argument is that the higher the level of education of the owner the greater is the probability of the firm's success and hence increased revenues.
- **Owner's prior experience:** It is often noted that companies with greater experience in the private sector may be less likely to bid and be successful in the public sector. We examine to see whether the owner's prior experience was in private sector (1) or public sector (2) and whether that has any bearing on gross revenues of the firm.
- **Race, ethnic or gender group of firm owners:** The variable is expected to test whether there is any statistically significant relationship between race/ethnicity/gender of S/M/W/DBEs and gross revenues.

Gross Revenues Regression Results (I):

Formally, the regression model is expressed as

$$GR = \beta_0 + \beta_1 X_1 + \beta_2 X_2 + \beta_3 X_3 + \beta_4 X_4 + \beta_5 X_5 + \epsilon$$

where,

GR = annual firm gross revenues for past year;

β_0 = the constant, representing the value of Y when $X_i = 0$

$\beta_i = \beta_1$ to β_5 , representing the coefficients of the magnitude of X_i 's effect on GR

$X_i = X_1$ to X_5 , representing the independent variables such as years in business, owner's experience, owner's education, full-time employees, race and gender.

ϵ = the error term, representing the variance in gross revenues unexplained by the independent variables, X_i .

The hypothesis of no difference (known as the null hypothesis) is tested, which represents that there is no difference in the past year's revenues of M/WBEs compared to non-minority-owned firms once capacity is accounted for. ($GR_{(S/M/W/DBEs)} = GR_{(Non-MWBEs)}$).

Disparity research theory contends that, all things being equal, the race, gender and/or ethnicity of a firm does have a bearing on a firm's revenue, i.e., the null hypothesis stated above is rejected. Results are statistically significant if it is determined that the probability of this difference due to chance was less than 5 in 100 (i.e., p-values of less than 0.05 or statistically significant).

One of the tests to examine whether the model specified explains the variability in the dependent variable is called the F-test. For the model presented, the F-value is noted to be statistically significant, asserting overall that the variation in revenues is explained by the variations in the specified explanatory variables (capacity and demographic independent variables listed above) and that the results are statistically significant. The detailed regression and results are presented and discussed below:

| Table 8.6. | | | | | |
|---|-----------------------------|------------|--------|------|-------------|
| BART - Results of Survey Regression Analysis Examining Gross Revenues of Firms | | | | | |
| | Unstandardized Coefficients | | T | Sig. | Significant |
| | B | Std. Error | | | |
| (Constant) | -.432 | 1.084 | -.399 | .691 | No |
| How many full-time, full-year employees does your company have presently across all locations it controls and operates? | 2.870 | .233 | 12.334 | .000 | Yes |
| Company Age | .040 | .012 | 3.467 | .001 | Yes |
| What is the highest degree or level of education that your principal has completed? | -.174 | .136 | -1.274 | .205 | No |
| African American-owned firms | .572 | .768 | .746 | .457 | No |
| Hispanic American-owned firms | .666 | .760 | .876 | .382 | No |
| Asian American-owned firms | .804 | .759 | 1.059 | .291 | No |
| Caucasian Female-owned firms | 1.768 | .798 | 2.216 | .028 | Yes |
| All other Minority firms except AF_A_H firms | -.201 | 1.056 | -.190 | .850 | No |
| Prior to the principal's involvement with your company, did he or she ever work in the same profession that the company specializes in presently? | -.219 | .137 | -1.598 | .112 | No |
| Majority Women-owned Firms | -.346 | .321 | -1.078 | .282 | No |
| F-Value/p-value: 25.249/ 0.000 | | | | | |
| Adj R-sq: 0.585 | | | | | |

Source: M³ Consulting

The results show that having a greater number of full-time employees (a proxy for the firm's size) and having been in business for more years correlates with increased revenues of the affected firms. The owner's education or prior industry experience does not appear to influence the variation in revenues.

After accounting for variables that may impact revenues of firms, race, gender and/or ethnicity of the firm's owner does not seem to have any influence, with the exception of Caucasian Female ownership, wherein they seem to positively influence the revenues.

The unstandardized beta coefficient for African American-owned firms was 0.572 and for Hispanic American-owned firms was 0.666, indicating that African American-owned firms had annual revenues that were one-half revenue categories lower than similarly situated (similar capacity) firms and similarly Hispanic American-owned firms had slightly less than one-half category lower than similarly situated (similar capacity) firms as were Asian American-owned firms. While the beta coefficients for African American-owned, Hispanic American-owned and Asian-American owned firms were not significant, Caucasian Female-owned firms was over one and one-half times statistically significantly higher than similarly situated firms. This implies that, after accounting for capacity, any variation in revenues of African-American owned, Hispanic American-owned and Asian American-owned firms from similarly situated non-MWBEs was purely due to chance. There may be other factors that attribute to Caucasian Female-owned firms having higher revenues. Looking at the t-test results above in Table 8.6, it is noted that Caucasian Female-owned firms were never denied a bond and rarely denied a loan/line of credit.

The above revenue regressions clearly indicate that after adjustments for variables such as years in business, education of owner, number of employees, owner's experience, other than for Caucasian Female-owned firms, where there is a positive and consistent relationship between Caucasian Female American- status and revenues, no other race/gender/ethnicity of the firm's owner shows any specific reasons for any variations in revenues other than chance.

8.4 DISPARITIES IN BUSINESS FORMATION: PUMS ANALYSIS

8.4.1 PUMS ANALYSES

Public Use Microdata Samples (PUMS) [from U.S. Census data] analysis is undertaken by M³ Consulting to examine the impact of race and gender, along with other demographic and economic factors that impact: (1) the choice of self-employment and (2) the level of self-employment income.

Promoting entrepreneurship is often a beneficial means to improve the economic status of minorities and women. Disparities in business formation often limit the development and growth of firms. In their research on this topic, Black, Holtz-Eakin and Rosenthal [2000]³⁵⁷ found that there was considerable spatial variation in self-employment rates (and self-employment earnings), especially for minority-owned firms—among metropolitan areas. Black, Holtz-Eakin and Rosenthal noted that the variation is 70 percent among Black Americans, 166 percent among Hispanics, and 100 percent among Asians. A central point of the literature in self-employment has been on the degree to which access to capital limits the ability of individuals to attain self-employment, especially the role of such constraints in explaining racial differences in self-employment. Meyer [1990]³⁵⁸. Black, Holtz-Eakin and Rosenthal [2000], in analyzing regional rates of self-employment for the prime-age males (25 to 64) found:

- Overall, in the United States, the self-employment rate is 10.4 percent, which includes a range from 9.9 percent in the Northeast to 12.7 percent in the Pacific region; a difference of nearly 30 percent.
- The rate of self-employment differs greatly across races, ranging from a low of 4.3 percent among Black Americans to 12.7 among Whites.

Blanchflower and Shadforth (2007) and others³⁵⁹ provide an excellent summary of the research in the area of self-employment. The findings in summary are that self-employment is higher among men than women; among older workers than younger workers; and is particularly high in construction and retailing. It is also especially high among some immigrant groups and varies by region and state being especially high in construction occupations, agriculture and retailing. Fairlie and Robb (2007b) found, that black business

³⁵⁷Black, D., D. Holtz-Eakin and S. Rosenthal (2001), "Racial Minorities, economic scale and the geography of Self-employment," Brookings-Wharton Papers on Urban Affairs, pp 245-286.

³⁵⁸ Meyer, B. 1990. "Why Are There So Few Black Entrepreneurs?" National Bureau of Economic Research, Working Paper No. 3537.

³⁵⁹Blanchflower, D.G., Levine, P., Zimmerman, D.: Discrimination in the small business credit market. *Rev Econ Stat* 85(4), 930–943 (2003); Blanchflower, D.G., Shadforth, C.: Entrepreneurship in the UK. *Found Trends Entrepreneurship* 3(4), 257–364 (2007)

owners were much less likely than white counterparts to have had a self-employed family member owner prior to starting their business and are less likely to have worked in that family member's business. Fairlie and Robb noted that the lack of prior work experience in a family business among black business owners, perhaps by limiting their acquisition of general and specific business human capital, negatively affects black business outcomes.

Blanchflower (2009)³⁶⁰ studied minority self-employment overall and particularly in the construction industry and examined the role that affirmative action programs have played in this context. Blanchflower points out that while the *Croson* case in 1989 made it very difficult to maintain affirmative action programs since the turn of the millennium numerous cases have changed the course of that discussion in the other direction, with courts declaring many programs constitutional³⁶¹. It is also noted that the low representation of minorities in particular among the ownership of firms in construction compared to their representation in the population as a whole. Based on the 2002 Economic Census Survey of Business Owners, of the 2,770,888 firms in construction, 2.4 percent were owned by African Americans; 7.0 percent by Hispanics; 1.1 percent by American Indians or Alaskan natives; 1.4 percent by Asians and Pacific Islanders and 10.5 percent by women compared to their proportional representation in the population³⁶² wherein African Americans were 12.8 percent; white Hispanics 13.7 percent; Asian/Pacific Islanders 4.6 percent; American Indians/Alaskan Native 1.0 percent and two or more races 1.8 percent.

Blanchflower (2009) study provides new evidence on self-employment rates by race and gender (using data for the period 1983–2006) as follows.

- Across all industries: 15.5 percent of white males were self-employed compared with 7.4 percent of white females 3.6 percent of African-Americans and 7.8 percent of Hispanics.
- In Construction: Self-employment rates of white men were 28 percent compared with 21 percent for white females, 17 percent for blacks and 13 percent for Hispanics.
- The gap between the earnings of white men and all groups, other than Asians remains large.
- The differential between the overall self-employment rates of white males and white females in construction has narrowed dramatically over time. The narrowing is more apparent than is found for 'all industries'.

³⁶⁰ Blanchflower, D.G., "Minority self-employment in the United States and the impact of affirmative action programs", *Ann Finance* (2009) 5:361–396.

³⁶¹ Also worth noting is Blanchflower, D.G., Wainwright, J.: An analysis of the impact of affirmative action programs on self-employment in the construction industry. National Bureau of Economic Research, Inc., NBER Working Papers # 11793 (2005)

³⁶² Based on the 2008 Statistical Abstract of the United States, population in 2006.

- The differential between the overall self-employment rates in construction of white males and blacks has narrowed but less than it has for white women. The differential between the overall self-employment rates in construction of white males and Hispanics has widened over time.

This section describes the two types of statistical analyses conducted to examine the impact of race and gender on self-employment, controlling for economic and demographic characteristics. The first analysis, undertaken via binary logistic regression, examines the likelihood that the individual will be self-employed. The second analysis, conducted via linear regression, examines the determinants of self-employment income. The analysis uses variables from the Public Use Microdata Sample (PUMS) data from the 2014 Census of Population and Housing. The labor force participants were selected for the sample if they satisfied the following criteria:

- Were residents of the State of California; and,
- Were 18 years of age or older.

A. Self-Employment Decision

First, M³ Consulting attempted to examine the factors that impact the self-employment decision and whether there are differences in the probability of self-employment among the different races and genders.

We examine the self-employment decision using a statistical technique called binary logistic regression model. In a logistic regression model, the dependent variable is a categorical variable where “yes” is equal to 1 and “no” is equal to 0. The binary logistic regression allows the statistician to determine if some certain characteristic increases or decreases the likelihood that the dependent variable will be a “yes” or a “no.” For instance, a statistician can use a logistic regression model to examine if a certain set of characteristics (called independent variables) will increase the likelihood of teen pregnancy in a certain population. Thus, the independent variables will allow the researcher to determine whether they contribute to the “yes” or “no” response, and also whether these variables impact the response variable by increasing or decreasing the likelihood. For example, the logistic regression may show that parental involvement may decrease the incidence of teen pregnancy, while single family home (lack of monitoring) may increase this likelihood. Similarly, we attempt to examine if a certain set of characteristics (called independent variables) will increase the likelihood of self-employment in a certain population (in this case, California). Mathematically, the logistic regression model can be written as:

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$$\ln(\pi/1-\pi) = \alpha + \beta_1 X_1 + \varepsilon_1$$

where:

| | |
|-----------------|--|
| $(\pi/1-\pi)$ | =the probability of self-employment |
| α | =a constant |
| β_1 | =the coefficient for each of the independent variables |
| X | =the independent variable, namely race, gender, education level, marital status, household income, and home ownership status |
| ε_1 | =the error term that captures the variation in the variables |

In this model, the binary logistic regression investigates if a set of independent variables such as race, gender, age, education, household type and other economic and demographic characteristics contribute to the likelihood of self-employment. This model is estimated for the entire sample from the PUMS database for the State of California, and then separately for self-employment in areas of construction, non-construction, architecture and engineering.

Secondly, M³ Consulting analyzed the factors that impact self-employment income and whether self-employment income is impacted by race and/or gender.

Linear regression is used to answer the question of whether the earnings of self-employed minority and white women owners are different from those of non-minorities, given a set of economic and demographic characteristics. The dependent variable in this analysis is the amount of self-employment earnings.

Mathematically, the linear regression model can be written as follows:

$$Y = \beta_0 + \beta_1 X_1 + \beta_2 X_2 + \beta_3 X_3 + \beta_4 X_4 + \dots + \varepsilon_1$$

where,

| | |
|-----------------|--|
| Y | =the self-employment income |
| β_0 | =a constant |
| β_1 | =the coefficient for each of the independent variables, representing the impact of that variable on the dependent variable, self-employment income |
| X | =the independent variable, namely race, gender, education level, marital status, language proficiency, disability, etc. |
| ε_1 | =the error term that captures the variation in the variables |

In the linear regression model, the impact of race and gender on the dependent variable is estimated, (earnings received by owners), controlling for the independent variables (economic and demographic characteristics).

B. Results and Discussion of the Analyses

This section provides the results of the binary logistic regression for impact of race and gender on the likelihood of self-employment.

The binary logistic regression analysis examined the impact of economic and demographic characteristics on the probability of self-employment across all industries. In particular, the analysis examined if minorities and non-minority females were more or less likely to be self-employed. The analysis includes six minority indicator variables: African American, Asian American, Hispanic American, Other Race or Women. Research finds that minorities and females are less likely to be self-employed, perhaps due to factors such as limited access to capital and other resources. Other factors, such as level of education attained, marital status, age, Last Employment status, Nativity, Income (Wages and Salaries), Property value as well as Industry may be contributing factors to self-employment. Thus, the likelihood of self-employment was determined to be a function of race and gender, a subset of economic and demographic variables that allow for self-employment.

The logistic regression is first estimated for the full PUMS sample for the State. The results of the logistic regression provide estimates of the independent variables and the probability of self-employment. The analysis allows the computation of the odds of self-employment or not, given this set of independent variables. The results of odds ratios for minority groups being self-employed are presented in the following table. The odds ratio estimates the probability of self-employment for the various race and gender groups after accounting for economic and rank demographic variables that may impact self-employment. Alternately, if minority groups who are similarly situated with non-minority males, with respect to economic and demographic variables are compared, the odds ratio estimates the probability of each group’s likelihood of self-employment compared to non-minority males.

| Table 8.7. | | |
|---|-------------------------|---------------------------|
| “Odds Ratio” For Self-Employment for Minority Groups Relative to Non-Minority Males Controlling for Economic and Demographic Factors | | |
| Race/Ethnic Group | Odds Coefficient | Odds Ratio Inverse |
| African American | 0.533 | 1.8762 |
| Asian Pacific Islander | 0.615 | 1.6260 |
| Other Race | 0.868 | 1.1521 |
| Hispanic American vs. Non-Hispanic American | 1.715 | 0.5831 |
| Male vs. Female | 1.709 | 0.5851 |

Source: M³ Consulting, Inc.; PUMS US Census Bureau;

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From the results listed in Table 8.7, comparing similarly situated individuals (in terms of economic and demographic variables), a non-minority male is 1.87 times more likely to be self-employed as an African American, 1.62 times as likely as an Asian American, about 1.15 times as likely as any Other Race and only little over half as likely as a Hispanic American to be self-employed. Also, women are half as likely as men to be self-employed.

The full results of the binary logistic regression are presented in the following table.

| Dependent Variable: Self-employed (or not) | Coefficient (β) | Standard Error | Significance (p-value) | Significance |
|---|---|-----------------------|-------------------------------|---------------------|
| Variables | | | | |
| Other Race | 0.1726 | 0.0136 | <.0001 | Yes |
| Asian American | -0.172 | 0.0128 | <.0001 | Yes |
| African American | -0.3146 | 0.0207 | <.0001 | Yes |
| Hispanic American | 0.2696 | 0.00644 | <.0001 | Yes |
| Female | 0.2681 | 0.00428 | <.0001 | Yes |
| Age | 0.1511 | 0.00177 | <.0001 | Yes |
| Age Squared | -0.00118 | 0.000017 | <.0001 | Yes |
| Married | 0.1055 | 0.00473 | <.0001 | Yes |
| Disabled | -0.0549 | 0.00766 | <.0001 | Yes |
| Some College or less | -0.297 | 0.00611 | <.0001 | Yes |
| Bachelor's degree or less | -0.0533 | 0.00677 | <.0001 | Yes |
| last worked within past 12 months | 1.0431 | 0.00687 | <.0001 | Yes |
| Construction | 0.8666 | 0.00762 | <.0001 | Yes |
| Professional Services | 0.702 | 0.00447 | <.0001 | Yes |
| Nativity | -0.1278 | 0.00566 | <.0001 | Yes |
| Wages or salary income past 12 months | -0.00002 | 1.23E-07 | <.0001 | Yes |
| Property Value | 5.10E-07 | 6.15E-09 | <.0001 | Yes |
| Constant | -6.2472 | 0.0454 | <.0001 | Yes |

Source: M³ Consulting, Inc.; PUMS US Census Bureau;

The logistic regression estimates the likelihood of self-employment based on race and gender characteristics, controlling for variables related to economic and demographic factors. Race and gender have a significantly negative impact on the probability of being self-employed; Asian American-, African American Women are significantly less likely to be self-employed in California, whereas Hispanic Americans are significantly less likely to be self-employed. Disabled workers, Workers with college education and Non-US Citizens are less likely to be self-employed. While younger people are likely to be self-employed as one gets older, this declines significantly. The economic and demographic control variables show that married individuals and those living in higher-value homes, perhaps with higher means and those that were last worked in the last 12 months are more likely to be self-employed. Surprisingly,

those with higher educational levels are less likely to be self-employed but it is possible that they are more easily able to secure and have professional careers in California. Those in the Construction industry appear to be more self-employed as well.

Focusing on the Construction Industry, Table 8.9 compares similarly situated individuals (in terms of economic and demographic variables) within the industry who are likely to be self-employed. The results show that a non-minority male is 1.65 times more likely to be self-employed as an African American, 1.37 times as likely as an Asian American, about 1.06 times as likely as any Other Race and only less than half as likely as a Hispanic American to be self-employed. Also, men are less two-and a half times as likely as women to be self-employed in Construction.

| Table 8.9. “Odds Ratio” For Self-Employment for Minority Groups Relative to Non-Minority Males Controlling for Economic and Demographic Factors Construction Only | | |
|--|-------------------------|---------------------------|
| Race/Ethnic Group | Odds Coefficient | Odds Ratio Inverse |
| African American | 0.607 | 1.6474 |
| Asian Pacific Islander | 0.729 | 1.3717 |
| Other Race | 0.947 | 1.0560 |
| Hispanic American vs. Non-Hispanic American | 2.131 | 0.4693 |
| Male vs. Female | 2.556 | 0.3912 |

Source: M³ Consulting, Inc.; PUMS US Census Bureau;

The full results of the binary logistic regression are presented in the following Table 8.10.

The logistic regression estimates the likelihood of self-employment based on race and gender characteristics, controlling for variables related to economic and demographic factors. The results are not that different for the Construction industry from the overall picture. Asian American-, African American Women are significantly less likely to be self-employed in California, whereas Hispanic Americans are significantly more likely to be self-employed. Overall, workers with some college education are less likely to be self-employed, but workers in the Construction industry with a college education are more likely to be self-employed in Construction. Those that earned a salary in the last 12 months are less likely to be self-employed. While younger people are likely to be self-employed, as they age, they increasingly become self-employed. The economic and demographic control variables show the same pattern in Construction as the overall picture that married individuals and those living in higher-value homes, perhaps with higher means and those that were last worked in the last 12 months are more likely to be self-employed.

| Table 8.10. | | | | |
|---|---|-----------------------|-------------------------------|-----------------------------------|
| Results of the Binary Logistic Regression Analysis for Construction Only | | | | |
| Dependent Variable: Self-employed (or not) | Coefficient (β) | Standard Error | Significance (p-value) | Significance |
| Variables | | | | |
| Other Race | 0.1626 | 0.044 | 0.0002 | Yes |
| Asian American | -0.0982 | 0.0509 | 0.0534 | Yes (but 10% level of confidence) |
| African American | -0.2819 | 0.0786 | 0.0003 | Yes |
| Hispanic American | 0.3784 | 0.0172 | <.0001 | Yes |
| Female | 0.4692 | 0.0231 | <.0001 | Yes |
| Age | 0.1178 | 0.00646 | <.0001 | Yes |
| Age Squared | -0.00077 | 0.000065 | <.0001 | Yes |
| Married | 0.1292 | 0.0155 | <.0001 | Yes |
| Some College or less | -0.1705 | 0.0322 | <.0001 | Yes |
| Bachelor's degree or less | 0.1588 | 0.0376 | <.0001 | Yes |
| When last worked within past 12 months | 0.7596 | 0.0213 | <.0001 | Yes |
| Wages or salary income past 12 months | -0.00003 | 4.78E-07 | <.0001 | Yes |
| Property Value | 7.35E-07 | 3.37E-08 | <.0001 | Yes |
| Constant | -5.4151 | 0.1615 | <.0001 | Yes |

Source: M³ Consulting, Inc.; PUMS US Census Bureau;

Following are the results of the linear regression for the impact of race and gender on self-employment earnings.

The linear regression analyses estimated the impact of race and gender on self-employment earnings, controlling for economic and demographic characteristics. The dependent variable for this analysis is self-employment earnings. The independent variables and the hypothesized relation to self-employment earnings are as follows:

- **Age:** Research shows that age proxies for experience, and self-employment earnings should be positively related to age.
- **Female (gender):** Research shows that males are more likely to receive higher earnings than females.
- **Race:** Research shows that non-minorities earn more than minorities, and minority status should be negatively related to earnings.
- **College Education:** Research shows that individuals with higher educational levels earn more, and college educated individuals should receive higher earnings.
- **Age-Squared:** Research shows a non-linear relation between earnings and age. This variable captures the fact that earnings increase up to a certain age, and then tend to level off.
- **Income:** Research shows a negative relation between earnings and income status.

- **Marital Status:** Research shows that married individuals tend to earn more than those single individuals.
- **Disability:** Research shows that those with disability will tend to have lower self-employment incomes.

Full Sample Results: The results of the linear regression of self-employment earnings are first estimated for the full sample for the State of California.

The results below lead us to note the following:

- All other variables kept constant, a self-employed Hispanic American will earn about \$960 more than a non-minority; a self-employed African American will earn about \$1,546 less, an Asian American will earn about \$1,535 less and a male self-employed person will earn \$1,803 more than a self-employed female, if self-employed.
- A disabled individual who is self-employed earns about \$1,120 less, as will someone with less than a college education who will earn \$4,162 less. A person with a bachelor's degree or less will earn \$3,271 lower being self-employed in California. US Citizens and married individuals earn higher self-employment earnings. Age increases earnings by about \$197. However, this decreases as one gets older, but by a very negligible amount.
- Among the industries, individuals in Professional services, Construction, Services and Finance industries are more likely to earn more in self-employment. In a majority of the industries this holds true with an exception of Military where there are no self-employment benefits.

| Variables | Coefficients (β) | Standard Error | t-statistic | p-value | Significant |
|-------------------|-------------------------|-----------------------|--------------------|----------------|--------------------|
| (Constant) | -4162.324069 | 239.9378368 | -17.35 | <.0001 | Yes |
| Other Race | -333.206816 | 47.0584289 | -7.08 | <.0001 | Yes |
| Asian American | -1535.750616 | 45.4955235 | -33.76 | <.0001 | Yes |
| African American | -1546.080258 | 71.1984068 | -21.72 | <.0001 | Yes |
| Hispanic American | 960.085908 | 40.1945488 | 23.89 | <.0001 | Yes |
| Female | 1803.038992 | 31.5917613 | 57.07 | <.0001 | Yes |
| Age | 197.078181 | 4.6639729 | 42.26 | <.0001 | Yes |
| Age-Squared | -1.591498 | 0.0471215 | -33.77 | <.0001 | Yes |
| Industry ADM | 233.036559 | 216.052186 | 1.08 | 0.2808 | No |
| Industry AGR | 1773.02796 | 203.6478285 | 8.71 | <.0001 | Yes |
| Industry CON | 5922.727067 | 213.1639245 | 27.78 | <.0001 | Yes |
| Industry EDU | 490.940158 | 209.0815154 | 2.35 | 0.0189 | Yes |
| Industry ENT | 3752.071471 | 208.717037 | 17.98 | <.0001 | Yes |
| Industry EXT | 1299.306499 | 462.860071 | 2.81 | 0.005 | Yes |

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| | | | | | |
|----------------------|--------------|-------------|--------|--------|-----|
| Industry FIN | 6958.330424 | 212.1939831 | 32.79 | <.0001 | Yes |
| Industry INF | 3007.749531 | 225.2485252 | 13.35 | <.0001 | Yes |
| Industry MED | 4347.639315 | 208.7678962 | 20.83 | <.0001 | Yes |
| Industry MFG | 1512.894808 | 207.6919081 | 7.28 | <.0001 | Yes |
| Industry MIL | 360.958311 | 332.9488463 | 1.08 | 0.2783 | No |
| Industry PRF | 7829.857204 | 206.2217201 | 37.97 | <.0001 | Yes |
| Industry RET | 3147.140933 | 207.3277398 | 15.18 | <.0001 | Yes |
| Industry SCA | 3614.90725 | 226.3849867 | 15.97 | <.0001 | Yes |
| Industry SRV | 5767.698609 | 214.5466506 | 26.88 | <.0001 | Yes |
| Industry TRN | 3088.630492 | 220.1445987 | 14.03 | <.0001 | Yes |
| Industry WHL | 3376.173263 | 223.6340875 | 15.1 | <.0001 | Yes |
| US Citizen | 546.296327 | 43.7101998 | 12.5 | <.0001 | Yes |
| Married | 498.686345 | 33.549822 | 14.86 | <.0001 | Yes |
| Disabled | -1120.940292 | 49.1830363 | -22.79 | <.0001 | Yes |
| Some College or less | -4162.529516 | 52.8235555 | -78.8 | <.0001 | Yes |
| Bachelor's or Less | -3271.298027 | 57.7325726 | -56.66 | <.0001 | Yes |

Source: M³ Consulting, Inc.; PUMS US Census Bureau;

Dependent Variable: SEMP Self-employment income past 12 months

Industry – ADM – Administrative Services, AGR- Agriculture; CON- Construction; EDU- Education; ENT – Entertainment Industry; EXT – Extraction Industries; FIN – Finance, Banking and Related Services; INF – Information Services; MED – Medical Services; MFG – Manufacturing; MIL – Military; PRF – Professional services; RET – Retail Services; SCA – SRV- Non-Professional Services; SCA – Individual and Family Services; TRN –Transportation Services; WHL – Wholesale Services;

For the construction industry, we document below in Table 8.8 that:

- All other variables kept constant, earnings are lower by \$3,830 for African Americans, \$2,755 for Asian Americans and \$580 for Other race individuals and \$5,382 for women that are self-employed. Hispanic Americans have significantly higher earnings of \$3,448 if self-employed.
- Disabled individuals earn \$2,901 less in the Construction industry, if self-employed. An individual with less than some college education will earn \$1,039 less if self-employed whereas someone with a college education earns about \$445 more than those without a college education. Age increases earnings by about \$495. However, this decreases with age, by about just a very small amount. Self-employed married individuals earn \$1,225 more than single individuals and US Citizens who are in construction earn only \$56 more than non-citizens if self-employed.

Table 8.12.
Linear Regression Results for the Determinants of Self-Employment Income by Race and Gender for the Construction Industry

| Variables | Coefficients (β) | Standard Error | t-statistic | p-value | Significant |
|----------------------|--------------------------|----------------|-------------|---------|-------------|
| (Constant) | -13848.531 | 1051.98292 | -13.16 | <.0001 | Yes |
| Other Race | -580.20542 | 245.451366 | -2.36 | 0.0181 | Yes |
| Asian American | -2755.7075 | 411.448106 | -6.7 | <.0001 | Yes |
| African American | -3830.823 | 583.480541 | -6.57 | <.0001 | Yes |
| Hispanic American | 3448.7976 | 230.404482 | 14.97 | <.0001 | Yes |
| Female | 5382.8457 | 291.564111 | 18.46 | <.0001 | Yes |
| Age | 495.50276 | 38.940168 | 12.72 | <.0001 | Yes |
| Age-Squared | -3.97753 | 0.422453 | -9.42 | <.0001 | Yes |
| US Citizen | 56.81491 | 236.264422 | 0.24 | 0.81 | No |
| Married | 1225.4367 | 190.300385 | 6.44 | <.0001 | Yes |
| Disabled | -2901.3718 | 341.695579 | -8.49 | <.0001 | Yes |
| Some College or less | -1039.1585 | 569.24695 | -1.83 | 0.0679 | No |
| Bachelor's or Less | 445.01002 | 619.646625 | 0.72 | 0.4727 | No |

Source: M³ Consulting, Inc.; PUMS US Census Bureau;
Dependent Variable: SEMP Self-employment income past 12 months

8.5 CONCLUSIONS

The purpose of this analysis is to determine if there are any differences in the capacity of race, gender and ethnic groups and after accounting for any differences in the capacity of firms, if race and gender are contributing factors to any disparities found.

- Based on D&B, there is little difference in capacity based on number of employees and revenues among the race/gender/ethnic groups in the CMSA.
- To analyze capacity of S/M/W/DBEs compared to Non-MWBEs, M³ Consulting conducted a survey of vendors that register to do business with BART and examined the differences in capacity by race/gender/ethnic groups. Some summary highlights from the survey are as follows:
 - On average, majority women-owned firms are statistically significantly younger but do not have significantly lower start-up capital as well as gross receipts.
 - There is also no significant difference in the number of times women-owned firms apply for a bond than their male counterparts but women-owned firms are denied a bond significantly fewer times on average. Similarly, MBEs apply

almost half the times than Non-MWBEs apply for bonds and loans/lines of credit, but get denied significantly more often.

- Women-owned firms, including Caucasian Female-owned firms are denied more often on loans or lines of credit, although this difference is not statistically significant.
 - MBEs and WBEs have significantly fewer full time employees and are younger on average than Non-MWBEs.
 - While start-up monies are not significantly different between the groups, the gross receipts between MBEs and WBEs are significantly smaller than Non-MWBEs.
- After accounting for variables that may that impact revenues of firms, race, gender or ethnicity of the firm's owner does not seem to be have any influence, with the exception of Caucasian Female ownership, wherein they seem to positively influence the revenues. Any variation in revenues of African-American owned, Hispanic American-owned and Asian American-owned firms from similarly situated non-MWBEs was purely due to chance.
 - Examining the factors that impact the self-employment decision it is noted that comparing similarly situated individuals (in terms of economic and demographic variables), in the State, a non-minority male is 1.87 times more likely to be self-employed as an African American, 1.62 times as likely as an Asian American, about 1.15 times as likely as any Other Race and only little over half as likely as a Hispanic American to be self-employed. Also, women are half as likely as men to be self-employed.
 - Further examining the likelihood of self-employment based on race and gender characteristics, controlling for variables related to economic and demographic factors, we find that compared to non-minority male, Asian American-owned and African American-owned firms and Women-owned firms are significantly less likely to be self-employed in California, whereas Hispanic Americans are significantly more likely to be self-employed. Also, consistent with the literature, those in the Construction industry appear to have more self-employment. Examination of the construction industry shows consistent results.
 - Examining the factors that impact self-employment earnings, we note that all other variables kept constant, a self-employed Hispanic American will earn about \$960 more than a non-minority firm; a self-employed African American will earn about

Chapter VIII

Capacity and Regression Analysis

\$1,546 less, an Asian American will earn about \$1,535 less and a female will earn \$1,803 less than a male, if self-employed.

While capacity differences do not appear to be distinct in the size of the firms based on revenues or full time employees based on race/gender or ethnicities, the constraints in capacities are more notable in business formation and factors related to the self-employment decision and earnings which include denials in bonds and loans/lines of credit.

CHAPTER 9: ANECDOTAL COMMENTS FROM THE MARKETPLACE

9.1 INTRODUCTION

As part of the disparity study process, M³ Consulting sought to explore the experiences of business owners in the San Francisco Bay area who seek business opportunities with BART. This chapter contains a categorized summary of anecdotal evidence collected concerning the issues and barriers small, minority and women business owners face in attempting to transact business with BART.

SUMMARY OF ANECDOTAL AND SURVEY PARTICIPANTS

The anecdotal data was gathered through a series of 22 one-on-one in-depth interviews and five focus groups, which included 27 participants. Those interviewed included both minority and women business owners, as well as non-minority male business owners. The objective of the in-depth interviews was to capture the experiences, attitudes, issues, and perceptions of business owners seeking opportunities with BART, and with other public and private organizations in the San Francisco Bay area.

The particularized accounts of business owner experiences contained in this chapter should be considered in tandem with the quantitative evidence regarding disparities in contracting discussed in the Availability, Utilization and Disparity chapters of this report. The anecdotal information may be used to further assess or identify the existence of racially or gender-based marketplace barriers and to corroborate statistical findings.

The framework for the collection and analysis of anecdotal evidence for this study has been suggested by the U.S. Supreme Court in the case *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989). In that case, the Court held that particularized anecdotal accounts of discrimination could help establish a compelling interest for a local government to institute a race-conscious remedy. Moreover, such evidence can provide a local entity with a firm basis for fashioning a program that is narrowly tailored to remedy identified forms of marketplace discrimination and other barriers to minority and non-minority women business participation in contract opportunities.

9.2 ANECDOTAL INTERVIEW METHODOLOGY

This chapter is comprised of anecdotal evidence collected by conducting confidential, in-depth interviews with Non-M/W/DBEs, minority, and women business owners, as well as five focus groups.

To develop the sample of business owners to contact for interviews, M³ Consulting utilized BART's vendor database and the Master S/M/W/DBE list. The Master S/M/W/DBE Certification list included data compiled by M³ Consulting from certified DBE, SBE and MWBE listings from BART, Caltrans and Alameda County.

Each vendor listed was identified in one of the five procurement categories: Architecture & Engineering, Construction, Other Services, Professional Services and Procurement.

Initially, from this list, a 300-firm random sample list was selected, including Non-M/W/DBEs, MBEs and Caucasian Female-owned firms. M³ Consulting attempted to contact the 300 vendors a minimum of three times. An additional 300 firms were randomly sampled and contacted a minimum of three times for a total of 600 firms contacted.

During this process, all interviews and discussions were confidential, except the focus group conducted with BART's Business Advisory Committee (BAC). Unlike all other interviews and focus groups, BART representatives participated in the BAC focus group. Although BART was part of the discussion, its presence did not decrease the candor of the BAC Advisory Board participants in sharing their experiences.

The following is a breakdown of the completed 22 in-depth interviews and 27 focus group participants, shown in Tables 9.1 and 9.2 by Race and Gender and by Industry Category:

| Table 9.1. One-on-One In-Depth Interview and Focus Group Participants | |
|--|-------------------------------|
| Interview Count | Firm Owner Race/Gender |
| 8 | White male-owned |
| 10 | Asian American-owned |
| 12 | Black American-owned |
| 13 | Hispanic American-owned |
| 4 | Caucasian Female-owned firm |
| 1 | SBE (Non-minority) |
| 49 | Total |

Source: 360 Total Concept, M³ Consulting

| Table 9.2. One-on-One In-Depth Interview and Focus Group Participants | |
|--|-------------------------------|
| Interview Count | Firm Industry Category |
| 5 | Architecture & Engineering |
| 22 | Construction |
| 17 | Professional Services |
| 3 | Nonprofessional Services* |
| 1 | Other Services |
| 1 | General Procurement |
| 49 | Total |

Source: 360 Total Concept, M³ Consulting

*3 non-professional service groups conduct advocacy work

Interviewers used M³ Consulting’s in-depth interview guide to probe and direct questions. Interviews were taped with interviewees’ consent.

M³ Consulting reviewed the interview transcripts, analyzed interviews, and developed common themes based on anecdotal interviews. Upon identifying patterns and consistent themes, interviews were categorized under specific topic headings. Excerpts from Interviews are provided as support, and the race and/or gender of interviewee is indicated.

INTERVIEW CONFIDENTIALITY

Each interviewee was assured his or her identity and the identity of his/her company would remain confidential, barring a court order that requires M³ Consulting to disclose this information. Efforts to verify or find corroborating data that supports any claim made during an anecdotal interview may subject the interviewee to foreseen and unforeseen reprisals.

Therefore, in using and following up on the comments reflected in this chapter, BART should take measures to protect interviewees from any retaliatory actions by others.

9.3 ANECDOTAL INTERVIEW FINDINGS

The following sections indicate the recurrent themes in the discussions found throughout the interviews. Each theme includes anecdotal comments directly from the interviewees illustrating the topic heading.

- **Theme 1**—Requirements that Deter DBEs, SBEs and MWBEs from Bidding on Public Sector Contracts
- **Theme 2**—Limitations that Impact DBE, SBE, and MWBE Growth and Capacity
- **Theme 3**—Challenges for DBEs, SBEs and MWBEs Pursuing Prime Contracts
- **Theme 4**—Inequitable Practices by Prime Contractors (Including Bonding and Insurance Issues)
- **Theme 5**—Capacity of Diverse Firms in the Aftermath of the Recession of 2008
- **Theme 6**—Suggestions and Comments

Lastly in this chapter, overall observations drawn from the interviews responses are discussed.

Theme 1: Requirements that Deter DBEs, SBEs, and MWBEs from Bidding on Public Sector Contracts

This section describes practices and requirements that make it difficult or undesirable for small-, minority- and women-owned businesses to pursue contracts within the public sector.

Interviewee 3, African American Female, Construction:

Interviewee 3 stated that governmental rules and regulations make it very difficult for small companies to get work. She relayed that when she started her business in 1985, the public sector comprised about 70 percent of her work. However, today, the majority of her business is with the private sector. She attributes the change to government rules and regulations. She states, “I’m not a union contractor and they have so much stuff going on now that it’s almost impossible for a smaller company to even get work.” She explains that the union rules and regulations have negatively impacted her ability to get work. For example, in addition to a contractor license, she is now also required to register her business with the California Department of Industrial Relations. She states that, as a non-union contractor, many of her

employees have worked with her for close to 20 years and have never completed an apprentice program, but are more than qualified to do the work than some union employees. She has to go back several years to obtain documentation that shows they are qualified. In her opinion, it has gotten to be too much of a hassle. In addition, she believes that she always encounters red tape when she bids as a prime contractor on BART jobs. “As far as working for BART, there have been jobs that I have bid as a prime and it’s always some type of red tape that comes up that makes me not want to bid anymore. It’s not worth it.” When the interviewer asked if the red tape is associated with prohibitive bonding and insurance requirements, request for financial information, or excessive forms, she commented, “bonding, insurance, all of the above.” She does admit that she has not been required to have bonding insurance because the prime contractors she has established relationships with have placed her firm under their coverage. However, she complains that BART requires too much insurance for her and the agency requires more insurance than other public sector agencies.

Interviewee 2, Hispanic American Male, Professional Services:

Interviewee 2 asserts that the amount of paperwork associated with doing business with BART creates an obstacle for small businesses. He explains, “It’s just that doing work with BART, which is a government agency, BART has a lot of its own little requirements. The paperwork, the documentation is not easy so if you don’t have much of a staff and aren’t able to gear up for that, it’s a lot of paperwork time. It’s only myself and my son here and we run around 25 employees in this field.”

Interviewee 7, Caucasian Male, Professional Services:

Interviewee 7 has a very small firm. He says, “we are the smallest you can get.” Although his firm is small, he has had a successful relationship with BART for over 15 years. He indicates the biggest challenge he faces in conducting business is “to get the government off of the small businesses’ backs; they just won’t leave us alone. They just keep on changing year after year after year. They just make it so tough on a small company that we’ve got to spend so much time and it’s so expensive for us to do the work that is required.” Interviewee 7 would like to grow his business, and he believes that if he were certified, his chances of winning more contracts within the public sector would improve. However, the process is tedious and requires too much paperwork.

Interviewee 12, Hispanic American Male, Construction:

Bonding requirements have been a hindrance for Interviewee 12, and as a small business owner, he has not been successful at winning contracts with BART. He attempted to bid on a contract with BART, but the agency had an allowance on top of the bid that was so high that it put his company out of the bonding capacity. He explains that bonding companies will not allow small companies without a solid reputation behind them to have a bond for a contract that has an allowance. He further states that this puts small companies at the mercy of bonding companies, and limits their capacity to bid on some work. He indicates that as a small company his bonding is limited. He has attempted to utilize BART's bonding assistance program, but the companies will not risk anything else. "Even though they told me I could get \$750,000 with collateral; I can only get \$250,000." In addition, they require a lot of paperwork and financial information. Interviewee 12 also notes that BART's insurance requirements are a big issue for small firms. "It is like BART creates a fence stopping small companies from bidding on projects. The only way you can work on these areas is to have a lot of insurance before signing the contract and then it takes two to three months to bring them for safety training. All this time and the \$15,000 has to come out of your pocket before you even get the work. All this is under prevailing wages and the union, so it's hard to kind of perform this work."

Interviewee 4, African American Male, Professional Services:

While Interviewee 4 has successfully obtained two contracts with BART, he has encountered barriers when doing business with the agency that were detrimental to his business and caused him to no longer seek opportunities with BART. He mentioned that after successfully winning two contracts with BART as a subcontractor, he bid on a couple more, but those contracts took too long to get off the ground floor. "When it takes six months to a year and no progress has been made, I cannot perform the same work at the price I gave you a year earlier. This is why I stepped back from BART because it takes too long to issue a contract." He further explained that by the time the contractor wanted him to do the work, he was involved with another project and could not perform both projects at the same time and at a high quality."

Focus Group (FG) 4, Participant D2, Asian American Male, Professional Services:

FG 4 Participant D2 said that he would love to work for BART, but the certification and recertification was a lot. He explained his company is a small business and does not have a staff that can deal with these kinds of things. "It means you actually have to take time to individually go and talk to this business, put all this paperwork together in order to renew."

It was a renewal issue.” He goes on to explain that for small business owners the recertification process with BART is an opportunity cost issue, and the business owner is not doing something else to maintain his business in order to fill out the paperwork required to get on a list that may or may not be doing anything for your business. Although certified, his company was not getting any work with BART, and from a small business owner’s perspective, it was not worth it, so they let their certification lapse.

FG 4, Participant D1, Asian American Female, Professional Services:

FG 4 Participant D1 is not currently certified with BART, but expressed an interest in becoming certified with the agency. However, she was concerned with the complexity of the certification process, and expressed that she needed to know that there is a real opportunity out there if she is going to expend the time and effort to complete the paperwork and go through the process. D1 also mentioned that her company’s biggest challenge is in the contract/liability language. She states, “that many times the contract language is so onerous that it puts a lot on consulting firms, especially for small companies who don’t have insurance.” She further states that having to pay \$1M for insurance for a small firm is really difficult, and to hold bond and defend bond for any problem they have. “Even the small companies, they are pushing the bonds now to everybody. We just walk away; it’s too big of a risk. One lawsuit is going to wipe us out. The risk is really wrong. Even today if we got invited to bid, with the onerous language we would just walk away.”

Theme 2: Limitations that Impact DBE, SBE and MWBE Growth and Capacity

These responses illustrate practices that have prevented small firms from bidding as prime contractors and gaining experience that will allow them to work independently and grow.

Interviewee 21, Hispanic American Female, Professional Services:

Interviewee 21’s company has provided architectural services for BART for the last 25 years. She explains her company bids as a subcontractor because BART’s opportunities for professional services in architecture are very limited. Interviewee 21 believes that the opportunity for MWBEs to do business with BART on the professional services side is tied to their ability to foster and build relationships with the prime contractors. She believes that MWBEs would benefit if BART created smaller contracts for these firms, so they would not have to rely on the prime contractors. In her opinion, currently, BART’s contracts are very large, which prevent many small firms from bidding on them as a prime contractor. However, if they were allocated as set asides, small contractors would have an opportunity to participate as prime contractors on these projects. She explains, “in order for MWBEs to

grow, it would be really helpful for BART to go in and look at having set asides for professional services, like they did before, but maybe even a bit more robust.” She goes on to say that it would be helpful for SBEs and MWBEs to have an allocation separate from general engineering contracts because it would allow them more ability to grow as they would be able to perform in a prime role, which would in turn allow SBEs to grow in ability to perform and in the ability to manage contracts. Although her firm shares a positive relationship with prime contractors and is able to get work, her firm would prefer to work independently as a prime contractor. Interviewee 21 has firsthand knowledge that MWBEs would benefit from this practice because her company was awarded a set aside from BART a few years ago and able to perform in a prime role. Although this approach is a bit more to manage, she believes that it is more useful to MWBEs.

Interviewee 9, African American Male, Professional Services:

Interviewee 9 states that BART’s current approach to creating projects and awarding contracts prevents small businesses from bidding as a prime and becoming more independent. Although he has not actually worked for BART, he has attended BART outreach sessions where he was told, in so many words, that the best approach for SBEs to be considered for large IT contracts, is to work with larger IT consultant businesses, like IBM. He was left with the impression that BART does not even seriously consider small businesses for those engagements. He further explains that, in his experience, larger firms like IBM are unresponsive to small businesses, and tend to work with companies that they have developed relationships with over the years. If a SBE has interest in being more independent and doing things differently, they are no longer considered. Interviewee 9 believes that this issue is not specific to BART, but all government agencies. He believes that government agencies depend on large businesses to facilitate efforts that will address small businesses’ challenges to succeed. According to Interviewee 9, large companies are only going to do as much as the government forces them to do. He states, “Because they don’t have interest in building a competitive marketplace, they are in a position where they are supposed to help small businesses become more successful and capable but at the same time, they would be building competition.” He believes that agencies, such as BART, should have some involvement to ensure that large and small businesses are working collaboratively on large government contracts. He feels that small businesses need development so they can operate as effectively as larger businesses.

FG C Participant C2, African American Female, Professional Services:

FG C2 participant stated that BART does not provide opportunities to small businesses. She remarks that BART awards contracts to the same companies again and again and needs to

break up that practice. “They have the same firm doing the work year after year after year.” She mentions that one particular company did work for BART for close to 50 years. She wants BART to look at new companies. “They need to look at new firms and break up the cartel of the same people doing the same work.” She believes that because its public money, it should be passed around. This would provide small businesses with a real opportunity.

FG D Participant D5, Asian American Male, Professional Services:

FG participant D5 agrees with C1. “I think each of the decision makers at BART are more comfortable with working with people that they have already worked with.” He continues, “So for the new person that’s never done work with BART, it’s hard to break in. If you look at who BART has done work with, it’s a small group.” I’ve lost interest in working with BART.

Interviewee 16, Caucasian Female, Construction:

Interviewee 16 believes that BART does not support SBEs. She finds that BART bundles their contracts to such a degree, that she can’t go after them and cannot compete with the larger firms. She feels that BART talks about supporting small businesses but really does not. She said, “If I said I had a program and really believed I had a program, I would want the input of the SB community, and I would want those contractors to actually perform work, not construction management or janitorial services because those are not constructions folks. BART likes to award contracts to the SBs that are kind of low-end companies. I don’t do janitorial, I don’t pull weeds, I build buildings, but not for BART.” She would prefer to work with BART directly, instead of indirectly through a prime contractor. In addition, she says, “From my point, you should give back to the community; you should give small businesses the opportunities, because I can’t bid on a \$10 million project. I can’t get the bonding for that.”

Interviewee 7, Caucasian Male, Professional Services:

Interviewee 7, on the other hand, has had a great relationship with BART for close to 20 years. “We’ve always had an excellent relationship with BART. The BART purchasing lady... was the only person we had contact with and that was generally once or twice a year. She would never call and say, Interviewee 7 you do this or you do that. It was always a once a year contract.”

Interviewee 11, Caucasian Male, Construction:

Interviewee 11 has worked with BART for about 15 years, and has a good experience working with the agency. He says, “I never really bid contracts with BART. They just call me when they have something and I give them a price. They put in a PO and I do it.” Interviewee 11 has had a good experience working with BART on all of the projects he has completed for the agency. “Great people, great working, it’s been good.”

Interviewee 21, Hispanic American Female, Architecture and Engineering:

Interviewee 21 also reports a positive relationship with BART. “We have good communication. Good relationship. I think it’s a level of comfort with us so if there’s any concerns or issues or if they are happy with us. It’s definitely a level of comfort, two-way[s].”

Theme 3: Challenges for DBEs, SBEs and MWBEs Pursuing Prime Contracts

These responses are examples of cases where firms felt unfair practices towards their small businesses lead to them not receiving contract award

FG D, Participant D2 Asian American Male, Professional Services:

FG 4 Participant D2 describes a situation in which he believes BART discriminated against his firm. He shares that his firm went to BART with an idea and BART put it out to bid, using D2’s firm idea. Then other firms came in and bid on the contract and BART chose two other people in front of D2’s firm. Those companies walked away, and instead of coming to D2 to do the work, they closed the contract down. D2 says, “I felt that there was certain bias against us and I would stand by that. It certainly wasn’t a matter of qualification; it certainly wasn’t a matter of knowledge of community. They just for whatever reason decided they did not want to talk to us.” D2 goes on to say, “For whatever reason, there was some kind of prejudice” against his firm.

FG C Participant C2 African American Female, Professional Services:

FG C Participant C2 describes a similar experience with BART. Her firm pursued a contract with BART and the agency canceled it and did not inform her why, and then BART put it out at a much higher amount. So initially, it was in a range where her company could bid as a prime. Then BART put it out again at a much higher revenue range to which her company still qualified as a prime, and her company bid again. Again, BART canceled without any

reason as to why. C2's firm had a debriefing with BART so BART could explain the process. At the debriefing, C2 learned that BART was hearing this same scenario from other contractors, and they said they were going to try to get together and address the issue, but C2's firm never heard anything else about it.

FG B B1 African American Female Representative of African American Male Firm, Construction:

FG B, Participant B1 points out that discrimination is prevalent in the construction industry in general. She believes that there is still discrimination going on when it comes to contractors and awarding minorities contracts on various projects. She notices that minor things, such as issues with paperwork, will result in a MWBE losing a contract. For example, "if you don't sign, if you don't answer #2 they try to eliminate you. Is that really a reason? But of course the reason they do it is so that can put the person they want in the slot. It's also the good old boys program," she states.

Theme 4: Inequitable Practices by Prime Contractors (Including Bonding and Insurance Issues)

This section describes unfair treatment the DBE, SBE and MWBE companies have experienced by primes

Interviewee 3, African American Female, Construction:

Interviewee 3 has not had any luck in establishing relationships through matchmaking sessions with prime contractors. "You go to these meetings and exchange business cards. You follow-up, they get back to you and that's it. After a while you get tired of calling and calling and no response." She shared an additional problem that she has with prime contractors. The primes will take her bid and give the job to someone else. She explains that she has been listed on projects as the prime's subcontractor, where the actual work is given to someone else.

Interviewee 12, Hispanic American Male, Construction:

Interviewee 12 has also attempted to network and form relationships with prime contractors, but these interactions have not landed him any contracts. He states that even though he invests the time to network with the general contractors, they already have their teams, so they basically attend outreach session only to meet a requirement. Interview 12 has also followed up with the general contractors by phone and in person, with no luck.

Interviewee 21, Hispanic American Female, Architecture and Engineering:

Interviewee 21 explains that her company has a long history and relationship with the contractors with whom they work at BART. She says that her firm reaches out to those contractors when they know contracts are coming. However, she did mention that although her firm has good relationships with prime contractors, the primes often self-perform the work that was identified as work for subs. She further explains that she has confirmed that this is happening by talking to the different BART project managers internally. She stated that her firm is currently on six engineering projects, but only actively working with two. In addition, in her opinion, in spite of her a good relationship with her prime contractors, she knows they would not reach out her company to perform work as a subcontractor if they did not have to comply with BART's requirements.

Interviewee 1, Asian American Male, Professional Services:

Interviewee 1 has also attempted to network and establish relationship with prime contractors in hopes of obtaining a contract as a sub, but he has had no luck. Interviewee 1 states that he did connect with other contractors at these events, and even built teams and bid on projects together, but nothing actually came of it. Interviewee 1 states, "the small firms did it because they're hungry. The larger firms are there but they don't give a damn. They just see you as a pain in the ass. They were there just looking down on us (i.e., not taking information, not making eye contact), they just don't care."

Interviewee 22, Caucasian Female, Architecture and Engineering:

Interviewee 22 says her company works with the same subcontractors because of the SF-330, which is required for every federal contract. "There is a matrix on there of ten projects and you have to put "Xs" for each of the firms that you've worked with on each project. Very discriminatory against using anyone that you haven't used before." Interviewee 22 further states that the State of California uses the form. She says, "And I've been told class after class, they want to see more "Xs" so it's very hard to use someone new. That's not to say that I don't. Sometimes I need a specialist that I've never used before, so then I show that team or company and explain the reason that I've brought them onto the team."

FG B5 African American Male, Non-Professional Services (Advocacy):

B5 says he is working on a job and is having problems with the prime. He says there have been three African American firms who have been working with this prime and all three have had problems with the prime trying to get them to perform work that violates their contract agreement. The general contractor's resolution is to get rid of them as soon as possible on the project. Two of the subcontractors have been let go, and there is still plenty of work left on the project. However, B5 refuses to violate his contract agreement. B5 brought the situation to BART's attention over two years ago, and they have refused to do anything about it. They keep promising to look into it, but nothing has been done yet.

FG A Participant A3 Hispanic American Male, Construction:

FG A Participant A3 says that “[w]e were listed as a local participant and yeah we got through the bid and then when it came down to really confirming coverage quantities, they didn't like our numbers. They wanted us to lower our price to fit their needs. It was not going to happen so we moved on.”

FG A Participant A4 Hispanic American Male, Construction:

FG A Participant A4 says he had a similar experience. His company won the bid, however, when it was time to sign the contract, they were asked to bond the contract. “It was not on the contract documents. Then at the time that we signed the contracts, they asked us to have a performance bond. Once they knew we could not bond, they kicked us out.”

Interviewee 17, Caucasian Male, Professional Services:

Interviewee 17 has witnessed unfair treatment towards subcontractors. “It was my opinion that they treated the subcontractor that I worked with unfairly. Not taking responsibility for their contract. A certain system was specified, and the one supplied delayed the project by a year. The subcontractor was blamed and he had nothing to do with it, in my opinion.”

FG A A5 Hispanic American Male, Construction:

According to A5, he also encountered discrimination during the bid process. He states, that when he goes into bid, he is consistently discriminated against. At the last BART meeting he attended, everyone of color was sitting on one side of the room and the general contractors

were sitting on the other side of the room together. “It’s crazy. That’s how it was at BART, so the discrimination started right there and it’s evident that the agency, BART knows that it exists.” In addition, he says they make comments like “those guys’ need to know what they need to do get a bond. Instead of saying how do we find ways to get them qualified to get bonded. They are qualified for work, but not qualified for bonding. So what can we do to increase their capacity so we can put them on our team consistently?” He also thinks that bonding and other financial requirements are the most discriminatory practices because little companies don’t have deep pockets.

He further explains, “Bonding is even a bigger step for smaller companies to participate on projects. So that’s another mechanism to build that barrier for participation of the small minority companies.”

Theme 5: Capacity of Diverse Firms in the Aftermath of Recession of 2008 and Prop 209

These responses describe the availability of qualified subcontractors in California

FG BAC11, Caucasian Female, Construction:

For FG BAC participant BAC11, business in the Bay Area is booming. In fact, she is hearing from contractors she has never heard of before, because all of their regular people are swamped. As a small business, she has been forced to turn away bid and jobs because she does not have the manpower to handle the work. She finds that there is a shortage of tradespeople. In her opinion, some of the reasons for the shortage include: more parents want their kids to go to college rather than work in the trades, today’s youngsters frown upon working in the trades, and Regional Occupational Programs (ROP) have gone away.

FG BAC5, Hispanic American Male, Architecture and Engineering:

FG BAC5 agrees with BAC11. He states that California and the entire nation are suffering from a massive shortfall in the number of qualified workers. He also agrees with BAC11 that youngsters are drawn to white-collar jobs that pay more and offer good perks. And they are more interested in white-collar career opportunities. He believes the millennial generation frowns down upon blue-collar jobs. “Construction is viewed as less than honorable, let alone desirable occupation. We go through 10 to 15 kids under 30 to get to one, because they don’t want to work. They’ve been programmed for this director of fun. That’s a result of the high tech industry.” He also notices another reason for the decline in the number of qualified

workers is related to the recession. With the recession of 2007, the construction industry lost a huge number of small construction subcontractors that are never coming back.

Interviewee 20, Caucasian Male, Construction:

Interviewee 20 is an electrical contractor. For him, it is very difficult to find qualified DBE and non-DBEs to bid on work. He attributes the low availability of manpower in his field to the substantially high volume of work in the Bay Area right now. “The hard part is even if you call the union halls, there is no help.” Another factor that has impacted the number of qualified workers in the trades is the recession of 2007. Interviewee 20 explains that many companies in his field went out of business with the recession, and large companies now employ many of those business owners. The limited manpower issue has hampered his ability to take on new jobs.

Interviewee 4, African American Male, Construction:

Interviewee 4 believes that Proposition 209 played a major role in the reduction of number of M/WBEs. According to him, before 209, M/WBEs were really on a roll and were getting a lot of work. He further states there were more minorities involved than ever. But when 209 came in, minority firms were overlooked or passed by, and stopped getting work. He says although he was able to maintain his business, growth stopped. Many minority businesses went out of business or left California or just decided they were not going to contract anymore. He says if you go to a minority association and look at their roster today, you will find that the roster has been depleted because there are no longer contracts for these groups anymore. He goes onto say that prior to 209, the minority associations were very useful for MBEs in helping them to obtain contracts. They held monthly meetings, had speakers, contractors would come out and tell them about jobs, tell them about specs for jobs for them to review and possibly bid. In fact, he was contacted and obtained two contracts as sub with BART through his membership in the association. He says because of the depletion in members in these associations, there is less outreach and fewer people coming to these meetings.

Interviewee 8 Caucasian Female, Professional Services:

Interviewee 8 has not noticed a decline in the availability of engineers in the Bay Area. In fact, she has noticed an increase in the number of female engineers and an increase in diversity. She says engineer staff is usually older, however. But currently, there is a more gender diverse population coming into the industry, and good talent now.

Interviewee 16, Caucasian Female, Construction:

Interviewee 16 says her problem is finding qualified subcontractors who can bond for her. “I make them back bond any project over \$25,000 if they are small. And they cannot do that. I don’t want to be left holding the bag if they fall down, and I tell everyone that up front.”

FG C Participant C3 African American Male, Construction:

FG Participant C3 has also noticed a reduction in the number of MWBEs as a result of proposition 209. He feels there is insufficient number of MWBEs for him to work with, due to Proposition 209. He states, “After Proposition 209 and the following years, 80 percent of all black contractors in the state were wiped out.” He explains further, “Even though BART is federal, they barely hung on to the federal requirements.” He feels the mentality of almost all of the agencies is that because they are state agencies, they do not have do anything about increasing the numbers of MWBEs who are awarded work with them. Therefore, the numbers of MWBEs awarded contracts has dropped. In his opinion, “BART needs to, in their own way, bring back Affirmative Action and give new companies a chance to participate too.”

Theme 6: Suggestions and Comments

This final section captures ideas presented by interviewees on how to improve and/or modify the S/M/W/DBE and procurement processes. This section also addresses the other issues that were not covered in the previous themes.

Interviewee 9, African American Male, Professional Services:

Interviewee 9 challenges BART to engage DBEs, SBEs and MWBEs as independently of large businesses as possible if the agency is really interested in their growth and development. In his opinion, when partnering with larger businesses, DBEs, SBEs and MWBEs are put in a setting where they have limited control and to some degree have to conform to what will be the strategic advantage of those large businesses. This practice will put the responsibility on DBEs, SBEs and MWBEs to be better prepared; it also puts a responsibility on the large agencies, like BART, that say they are really interested in assisting and developing small firms.

Interviewee 6, African American Male, Professional Services:

Interviewee 6 has several recommendations for BART that he believes will help improve the bidding process. Firstly, he suggests BART improves its outreach to DBEs, SBEs and MWBEs by meeting with them at least once or twice a year to provide information about upcoming projects, and what are the different engines they are using to distribute that information. In his opinion, communication is important. He suggests BART makes it clear where companies can go to find information. He believes that when BART first initiated their outreach programs, they probably worked well, but times have changed. New strategies and open forums need to be had. BART needs to understand the mechanisms it is using to inform firms that projects are out there. It's difficult for firms to find out about a project and to not have enough time to put the team together.

Secondly, he believes that in order to get prime contractors to consider matchmaking sessions as a real mechanism to find partnering opportunities, agencies such as BART have to have a mandatory minimal number, regardless of the DBE or SBE goals. Otherwise DBEs, SBEs and MWBEs will not get serious consideration by primes. He believes primes have the stronger ability to win the job, but they need to share in the rewards of winning these jobs. He states, there needs to be a number where the small firms are making something from these jobs. It can't be a mediocre number. "It has to be a number that works."

Interviewee 8, Caucasian Female, Construction:

Interviewee 8 has observed that often, when an RFP gets released, to be competitive, the teams are already established, so a diverse sub may not have an opportunity to partner on the job, because the teams have already been determined. She suggests, "the main thing may be to require some sort of diversity partnership in the bid." She also thinks, "for bigger opportunities, the more BART can release that information sooner than later, it would give the team better structure."

Interviewee 3, African American Female, Construction:

Interviewee 3 would like to see BART break up its contracts into smaller contracts so that smaller companies can get some of the work.

FG B Participant B5, African American Male, Non-Professional Services (Advocacy):

In order to ensure that primes utilize DBEs, B5 wants BART to hold their feet to the fire. He feels there should be no option for primes to say they made a good faith effort to find someone in the community, and could not find a qualified DBE. He believes primes have no motivation to work with DBEs and will not do so unless they are forced to do so, and are held accountable.

FG C, Participant C2 African American Female, Professional Services:

When sending out information regarding RFPs, FG C Participant C2 would like for BART to make sure the language is clear in terms of instructions about how to respond to the RFPs. She thinks that has been a really big issue for DBEs, SBEs and MWBEs.

FG BAC Participant BAC7, Asian American Male, Construction:

FG BAC Participant 7 thinks that BART should make it a requirement that primes cannot use the same subs on projects, over and over again. He wants primes to be required to bring a new partner, or someone they don't use a lot, for some portion of the work on a project. BAC8 recalls that San Francisco had a policy that if a prime used certain subcontractors, they could not use them in the next round. This forced primes to go out and find other people. He says it worked for a while and then they kind of backed off on it because everybody was working so they didn't need to force that policy anymore. However, it was a good way to ensure that more companies got a chance. He believes it's ok for primes to use some of their old guys, but a certain percentage of the work should have to go to someone new.

FG BAC, Participant 4, African American Female, Professional Services:

FG BAC Participant 4 advocated for a small business set-aside. "We have shown over the years that we are very, very capable. Any of these companies that we have had an opportunity to work with can confirm that. But every time we have tried to do something on our own the decision makers—they don't think we are capable or that we have the proficiencies that are required. They don't tell you that, but you can tell by the body language. And so it is to a point now that if you don't partner with a prime, you don't have a chance."

FG 2, Participant 4, African American Male, Construction:

FG 2 Participant 4 says a prequalified subcontractor list would also increase the number of DBEs, SBEs and MWBEs who win contracts because it would make it much easier on primes to identify DBEs, SBEs and MWBEs who are qualified to do the work. S4 says he worked for a company who instituted this procedure. The firm identified DBE contractors they felt could do the work, identified DBEs who performed the work in the past, and then did a qualification analysis. Those who made it through to the qualification analysis were put on the list and sent to the primes who were bidding on the work, and primes were forced to choose from one of the prequalified firms for each group.

Interviewee 20, Caucasian Male, Construction:

Interviewee 20 says BART plans are not as good as other agencies. He needs “better clarification from BART on scope of the project of what is really necessary to complete the project.”

Interviewee 17, Caucasian Male, Professional Services:

Interviewee 17 suggests BART allow its engineers to have more input in the product they receive. She believes that the manner in which the entire agency is set up is different from other agencies. In her experience, engineering usually has more to say about the product they receive. She thinks it is a “ridiculous and very inefficient way of doing things. Also, she states, “BART tends to have a personality point where depending on the project manager for that project will determine how successful it will be.” In her opinion, “this is not a good way to run a business.” She would institute cross training and accountability to the managers about that. She also recommends that BART needs to make sure its contracts are written professionally and reviewed by attorneys and finance. She further suggests that it would be helpful to have them reviewed by engineers and operations to avoid contradictory paragraphs.

Interviewee 22, Caucasian Female, Architecture and Engineering:

Interviewee 22 feels that it would be useful to MWBEs if BART would post its contract opportunities on Alameda County’s website as additional outreach. She also believes that by breaking the projects down into smaller contracts that do not require a high insurance threshold and manageable to firms of just 10-20 people.

FG D Participant 5 Asian American Male, Professional Services:

FG D Participant 5 suggests a restructuring of the RFP process. In his opinion, the same people are awarded contracts because, “by the time the RFP is announced, it is a sole source type of RFP and they go with just the same few vendors so we have very limited chance of getting the contract.” He believes that the process to setup the RFP has to be more open. He feels that DBEs, SBEs and MWBEs should be invited for discussion with the individual department that is over the project, ahead of the RFP to have open communication with DBEs, SBEs and MWBEs on how to solve BART’s needs before they are already set on the solution process. “Get way ahead of the curve before it comes down to a specific equipment or service.” He also says that small businesses need time to pull a team together before they submit an RFP. He suggests providing them with a three to six-month lead before announcing an RFP would be helpful.

FG D Participant 2 Asian American Male, Professional Services:

FG D Participant 2 wants real community outreach from BART with real opportunities, “with a BART official, someone who small businesses can call directly and has impact to make a change. Someone who is a decision maker, not someone who is there just passing out information.”

FG B Participant B5 African American Male, Non-Professional Services (Advocacy):

FG B participant B5 suggests simplification in the certification procedures. He thinks it would be a good idea to require one certification for all agencies instead of going through the process over and over. “I have to do one to be SLBE, one for the City of Oakland, I have to do one for BART and then that information can be applied to everything, because you’re one company not five different agencies so why do it for five different agencies?”

9.4 OBSERVATIONS DRAWN FROM THE INTERVIEWS

After analyzing the anecdotal evidence collected from 49 business owners and representatives in the San Francisco Bay Area, the following observations illustrate the possible barriers that interviewees perceive to exist for minority and women business owners as they attempt to transact business with BART.

1. **DBE, SBE and MWBE Need to for Additional Support**—Several persons interviewed expressed they wanted more support from BART ‘s on various levels:
 - a. Reduce contract size so DBEs, SBEs and MWBEs can qualify to bid as prime contractors. This reduces the need of these firms to always have to work as subcontractors to large firms in order to work on BART projects.
 - b. Diversify contractor pool, use new firms on BART projects. This will diversify contractors working on projects.
 - c. Reduce BART preference for large contractors, over local DBEs, SBEs and MWBEs, even if the local firm can provide better and more expedient service.
 - d. Streamline certification process, waive bonding requirements for small firms working as subs, reduce insurance requirements, financial information required, and minimize number of forms needed to work on a BART project.
 - e. Revise language in policy or contracts that will eliminate the ability for prime’s to cancel contracts without explanation, and discriminatory practices towards M/W/DBEs.

2. **Discriminatory Treatment by Prime Contractors**—Firms interviewed identified unfair treatment they have encountered when dealing with prime contractor. They include:
 - a. Ineffective matchmaking sessions. Prime contractors are not truly interested in networking with DBEs, SBEs and MWBEs. They only attend the sessions to fulfill the contract requirements. They do not respond to subcontractors’ follow-up calls and subcontractors rarely get work as a result of these sessions.
 - b. Subcontractors are often listed on a prime’s bid and/or awarded contracts by primes, however, they are not actually used on the project. In some instances, primes “self-perform” the work.

- c. Discriminatory practices by primes including excessive bonding and insurance requirements, post-bid or post-award bonding requirements, attempts to improperly force changes in contracted scope of work, and derogatory comments and attitudes.
 - d. Excessive paperwork, red tape and regulations involved in working with the public sector.
3. **Capacity Limitations**—Firms identify factors contributing to the availability of DBEs, SBEs and MWBEs.
- a. Many DBEs, SBEs and MWBEs have gone out of business as a result of the 2007 recession and it is difficult to identify firms, as well as qualified labor, available to complete jobs; while the market is currently booming, there are significant labor shortages and subcontractor unavailability, resulting from the lack of recovery from the recession.
 - b. Proposition 209 has also contributed to the decline in DBEs, SBEs and MWBEs available and ready to work on projects.
 - c. The construction industry is seeing a decline in available employees because fewer youngsters are going into to trades because they frown upon working in the industry and are more interested in white-collar careers.
 - d. Some small business owners gravitated to the private sector because they have a better experience working with private firms. For example, there is less red tape, and they have the opportunity to communicate one-on-one and negotiate with private business owners.

CHAPTER 10: ANALYSIS OF PRIVATE SECTOR DISPARITIES

10.1 INTRODUCTION

To gain a better understanding of factors outside of BART that may limit participation of DBEs, SBs and MWBEs in the bidding process at BART, the role of the private sector was examined. Given the examination and results of availability and utilization of DBEs, SBs and MWBEs in previous chapters, the analysis in this chapter may offer some insight into the extent of DBE, SB and MWBE penetration of the private sector, particularly the local construction industry.

The chapter begins with a summary of background information on the demographic and economic profile of the State of California and the San Francisco-Oakland-Fremont MSA (utilizing U.S. Census data); and, a brief description of the industrial and occupational composition of the local economy.

Following this summary is a review of available research that addresses private sector disparities.³⁶³ This chapter examines private sector disparities, primarily in the construction industry, in the following ways:

- Occupational and apprentice employment using 2010 Census data;
- Comparison by occupation of employment in the market place (based on EEO census tabulations);
- Private sector and public sector bid and award activity, based on Reed Elsevier data;
- City and County of San Francisco building permits data.

To the extent the data allow, the present analysis may offer some evidence of the existence of passive participation, if any, by BART, in discriminatory acts in the private sector.

10.2 DEMOGRAPHIC AND ECONOMIC PROFILE OF THE RELEVANT MARKET

The demographic structure of the local area may explain some differences in the market availability and utilization of DBEs, SBs and MWBEs, since business owners are a subset of the general population. First understanding the broad contours of the population in the State of California and the San Francisco-Oakland-Fremont MSA, as reflected in Table 10.1, is

³⁶³ A fundamental constraint, however, is the scarcity of economic and historical research that is sufficiently localized to address the first *Croson* standard.

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necessary to identify instances in which discrimination may have inhibited DBE, SB and MWBE development.

The race/ethnic distribution of the population in the State of California includes Whites at about 63 percent and Hispanic Americans or Latinos at 34.75 percent. Asian Americans are the next largest race/ethnicity at 14.44 percent, with African Americans at 5.96 percent and American Indians making up less than 0.74 percent of the total population in the State.

The San Francisco-Oakland-Fremont MSA includes a lower proportion of Whites and Hispanic Americans as compared to representation in the State at 54.32 percent and 19.63 percent, respectively. Asian Americans and African Americans in the San Francisco-Oakland-Fremont MSA reflected a higher proportion at 25.14 percent and 7.81 percent, respectively.

| Table 10.1. Total Population 16 Years and Older by Race and Hispanic Origin 2015 | | | | |
|---|------------|-------|---------------------------------------|-------|
| Ethnicity | California | | San Francisco-Oakland-Fremont, CA MSA | |
| | # | % | # | % |
| Hispanic or Latino | 10,533,566 | 34.75 | 725,996 | 19.63 |
| Not Hispanic or Latino | | | | |
| White alone | 19,091,080 | 62.98 | 2,009,457 | 54.32 |
| American Indian and Alaska Native alone | 225,244 | 0.74 | 17,905 | 0.48 |
| Asian alone | 4,376,745 | 14.44 | 929,989 | 25.14 |
| Black or African American alone | 1,807,540 | 5.96 | 289,058 | 7.81 |
| Native Hawaiian and Other Pacific Islander alone | 119,471 | 0.39 | 26,759 | 0.72 |
| Some other race alone | 3,639,416 | 12.01 | 274,559 | 7.42 |
| Population of two or more races | 1,052,933 | 3.47 | 151,590 | 4.10 |
| Total | 30,312,429 | 100.0 | 3,699,317 | 100.0 |

Source: U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates, M³ Consulting, Inc.

The percentage of a particular group’s population that is a part of the civilian labor in the State, as well as in the San Francisco-Oakland-Fremont MSA is reflected in Table 10.2 for the period. On average, 60 to 70 percent of each group’s population is represented in the civilian labor force. Hispanic Americans have the highest level of their group within the labor force in both the State at 66.60 percent and the MSA at 70.60 percent. African Americans have the lowest level of their group within the labor force in both the State 59.40 percent at and the MSA at 61 percent. Whites have a higher level of participation in the civilian labor

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force in the MSA at 67.60 percent than in the State at 63 percent. Similar, Asian Americans represent a higher level in the San Francisco-Oakland-Fremont MSA at 66 percent, as compared to the State at 63.40 percent.

Comparatively, Whites make up over 60 percent of the labor force at the State level. Hispanic American participation rises to about 37 percent. African Americans and Asian Americans participation falls at the State level to 5.57 percent and 14.39 percent, respectively.

Table 10.2.
Labor Force Participation
By Race and Hispanic Origin
2015

| Subject | California | | | San Francisco-Oakland-Hayward, CA Metro Area | | |
|--|------------------|--------------------------------|-----------------------------|--|--------------------------------|-----------------------------|
| | Total Population | Labor Force Participation Rate | | Total Population | Labor Force Participation Rate | |
| | Estimate | Estimate | Calculated from percentage* | Estimate | Estimate | Calculated from percentage* |
| Population 16 years and over | 30,312,429 | 63.60 | 19,278,705 | 3,699,317 | 66.90 | 2,474,843 |
| RACE AND HISPANIC OR LATINO ORIGIN | | | | | | |
| White alone | 19,091,080 | 63.00 | 12,027,380 | 2,009,457 | 67.40 | 1,354,374 |
| Black or African American alone | 1,807,540 | 59.40 | 1,073,679 | 289,058 | 61.00 | 176,325 |
| American Indian and Alaska Native alone | 225,244 | 59.70 | 134,471 | 17,905 | 62.30 | 11,155 |
| Asian alone | 4,376,745 | 63.40 | 2,774,856 | 929,989 | 66.00 | 613,793 |
| Native Hawaiian and Other Pacific Islander alone | 119,471 | 66.70 | 79,687 | 26,759 | 68.60 | 18,357 |
| Some other race alone | 3,639,416 | 68.70 | 2,500,279 | 274,559 | 72.70 | 199,604 |
| Two or more races | 1,052,933 | 64.80 | 682,301 | 151,590 | 67.60 | 102,475 |
| Hispanic or Latino origin (of any race) | 10,533,566 | 66.60 | 7,015,355 | 725,996 | 70.60 | 512,553 |

Source: U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates, M³ Consulting, Inc.

*Calculated by M³ Consulting

10.3 EDUCATION AND TRAINING: PATHWAYS TO BUSINESS FORMATION

It is generally recognized that relevant education and prior experience in an industry and occupation are strongly and positively correlated with the business formation decision. Of particular relevance to the formation of new businesses is the availability of jobs that offer the opportunity for occupational training, either in the form of formal apprenticeship training, or other more or less formal pathways to occupational expertise. This connection is particularly important in the construction industry.

10.3.1 EMPLOYMENT IN APPRENTICEABLE EEO CONSTRUCTION OCCUPATIONS

A. San Francisco-Oakland-Fremont MSA

Table 10.3 summarizes employment in selected apprenticeable EEO construction occupations in 2010 for the San Francisco-Oakland-Fremont MSA, as enumerated by the 2010 Census EEO File. For all the construction-related occupations, men dominate the construction industry with over 80 percent in every category, except in Productive Operative workers, where representation dips to 66 percent.

Among all racial and ethnic groups, Hispanic Americans have the greatest presence in the construction industry and are represented in all of the subsectors as well (and are second only to Asian Americans and Whites in the number of persons in the MSA labor force); however, they are concentrated heavily in Construction and Extractive crafts (47.8 percent) and as laborers and helpers (52.3 percent), with the lowest presence in Installation, Maintenance and Repair Crafts at 24.4 percent. Hispanic American females have a very small presence in construction, except as Productive Operative Workers (11.6 percent).

While Whites in construction are largely represented in Installation, Maintenance and Repair craftwork (43.5 percent) and in Construction and Extractive crafts (36.2 percent), they do participate in all areas of construction, with the lowest presence as Production Operative Workers at 24 percent.

Among the non-Hispanic minority groups, Asian Americans dominate construction followed by African Americans. Asian Americans are most represented in Production Operative Workers (at 31.8 percent), Installation, Maintenance and Repair Craft (at 22.9 percent), and Transportation and Material Moving Operations (at 20.9 percent), although they have some representation in all areas of construction. African Americans, while engaged in all subsectors of construction, have a relatively small presence in construction operations with

the highest presence in Transportation and Material Moving Operations (at 13.9 percent) and lowest as Productive Operatives at 4.5 percent.

B. State of California

In the State of California (Table 10.4), the employment patterns in EEO construction occupation are similar to those seen in the San Francisco-Oakland-Fremont MSA. Males lead the construction industry with over 80 percent, except in Productive operative workers where they represent about 69 percent of employees.

Hispanic Americans have the greatest relative presence in the construction industry in the State, even more so than in the San Francisco-Oakland-Fremont MSA. They are concentrated heavily in Construction and Extractive crafts (54.7 percent) and as laborers and helpers (69.4 percent), with the lowest presence in Installation, Maintenance and Repair Crafts at 39.1 percent. Hispanic American females have a very small presence in construction, except as Productive Operative workers (22.3 percent) and some presence in Transportation and Material Moving Operations (11.2 percent), as well as Laborers and Helpers (9.5 percent).

Non-Hispanic Whites are largely concentrated in Installation, Maintenance and Repair craft work (43.0 percent) and in Construction and Extractive crafts (36.4 percent), with the lowest presence as Laborers and Helpers at 19.2 percent. Among the non-Hispanic minority groups, Asian Americans and African Americans had some presence in the Construction occupations, although the highest presence was barely at 10 percent and 7 percent, respectively. Asian Americans are largest in Production Operative Workers (at 14.2 percent), Installation, Maintenance and Repair Craft (at 11.1 percent), and Transportation and Material Moving Operations (at 8.6 percent). The presence was much lower at the State level, compared to the San Francisco-Oakland-Fremont MSA. Asian American females in construction were mainly in Productive Operative occupations, with less than 2 percent in all other areas of construction in the State.

In Transportation and Material Moving Operations (at 7.2 percent) African Americans, while engaged in all subsectors of construction, have a relatively small presence in construction operations, with the lowest as Productive Operatives at 2.7 percent. African American females have almost no present in construction at the State level, with the highest presence in Transportation and Material Moving Operations at 1.5 percent.

Based on the results above for construction, Hispanic Americans and Whites appear to dominate construction operations in the San Francisco-Oakland-Fremont MSA and at the State level, while Asian American and African Americans have a smaller presence. Other Non-Hispanic ethnic groups or those of mixed race have a very small presence in the

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construction industry occupations in the San Francisco-Oakland-Fremont MSA, as well as the State.

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Table 10.3.
Employment in Selected Apprenticeable EEO Construction Occupations
By Hispanic Origin and Race, 2010
San Francisco-Oakland-Fremont MSA

| Occupation | Construction and Extractive Craft Workers | | | Installation, Maintenance and Repair Craft Workers | | | Production Operative Workers | | | Transportation and Material Moving Operative Workers | | | Laborers and Helpers | | |
|--------------------------------|---|--------|----------|--|--------|----------|------------------------------|--------|----------|--|--------|----------|----------------------|--------|----------|
| | Total # | Male % | Female % | Total # | Male % | Female % | Total # | Male % | Female % | Total # | Male % | Female % | Total # | Male % | Female % |
| Total | 109,045 | 97.6 | 2.4 | 65,775 | 91.2 | 8.8 | 60,985 | 65.9 | 34.1 | 72,425 | 82.9 | 17.1 | 64,845 | 83.8 | 16.2 |
| White non-Hispanic | 39,490 | 35.0 | 1.2 | 28,600 | 40.0 | 3.5 | 14,595 | 18.1 | 5.9 | 21,325 | 25.7 | 3.8 | 16,340 | 18.4 | 6.8 |
| Hispanic | 52,020 | 47.1 | 0.7 | 15,990 | 23.0 | 1.4 | 22,405 | 25.1 | 11.6 | 22,370 | 25.8 | 5.1 | 33,915 | 46.8 | 5.5 |
| Black non-Hispanic | 5,050 | 4.5 | 0.2 | 3,650 | 4.9 | 0.7 | 2,785 | 3.2 | 1.3 | 10,065 | 11.0 | 2.9 | 5,545 | 7.1 | 1.4 |
| AIAN non-Hispanic | 395 | 0.4 | 0.0 | 150 | 0.2 | 0.0 | 85 | 0.1 | 0.0 | 255 | 0.3 | 0.1 | 170 | 0.2 | 0.1 |
| Asian non-Hispanic | 9,635 | 8.6 | 0.3 | 15,035 | 20.0 | 2.9 | 19,415 | 17.4 | 14.4 | 15,160 | 16.5 | 4.4 | 6,910 | 8.8 | 1.9 |
| NHOPI non-Hispanic | 845 | 0.7 | 0.0 | 810 | 1.1 | 0.1 | 630 | 0.8 | 0.2 | 975 | 1.3 | 0.1 | 500 | 0.7 | 0.1 |
| Black & White non-Hispanic | 150 | 0.1 | 0.0 | 170 | 0.3 | 0.0 | 45 | 0.0 | 0.0 | 185 | 0.2 | 0.1 | 110 | 0.2 | 0.0 |
| AIAN & White non-Hispanic | 230 | 0.2 | 0.0 | 240 | 0.3 | 0.1 | 255 | 0.3 | 0.1 | 250 | 0.3 | 0.1 | 235 | 0.3 | 0.1 |
| AIAN & Black non-Hispanic | 15 | 0.0 | 0.0 | 45 | 0.1 | 0.0 | 0 | 0.0 | 0.0 | 265 | 0.2 | 0.2 | 85 | 0.1 | 0.0 |
| Asian & White non-Hispanic | 515 | 0.4 | 0.0 | 420 | 0.6 | 0.0 | 220 | 0.2 | 0.2 | 345 | 0.4 | 0.1 | 405 | 0.5 | 0.1 |
| Balance 2+ Races, non-Hispanic | 695 | 0.6 | 0.0 | 655 | 1.0 | 0.0 | 555 | 0.7 | 0.3 | 1,230 | 1.3 | 0.4 | 630 | 0.8 | 0.2 |

Source: US Census Bureau, Census 2010 special tabulation - Data based on where people live.

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Table 10.4.
Employment in Selected Apprenticable EEO Construction Occupations
By Hispanic Origin and Race, 2000
State of California

| Occupation | Construction and Extractive Craft Workers | | | Installation, Maintenance and Repair Craft Workers | | | Production Operative Workers | | | Transportation and Material Moving Operative Workers | | | Laborers and Helpers | | |
|---------------------------------------|---|--------|----------|--|--------|----------|------------------------------|--------|----------|--|--------|----------|----------------------|--------|----------|
| | Total # | Male % | Female % | Total # | Male % | Female % | Total # | Male % | Female % | Total # | Male % | Female % | Total # | Male % | Female % |
| Total | 1,036,330 | 97.8 | 2.2 | 663,530 | 92.8 | 7.2 | 792,860 | 66.0 | 34.0 | 780,745 | 80.6 | 19.4 | 870,025 | 82.9 | 17.1 |
| White non-Hispanic | 377,420 | 35.4 | 1.0 | 285,420 | 40.2 | 2.8 | 154,245 | 15.2 | 4.2 | 226,850 | 24.9 | 4.2 | 167,320 | 15.3 | 3.9 |
| Hispanic | 575,265 | 54.7 | 0.8 | 259,595 | 36.6 | 2.5 | 491,145 | 39.6 | 22.3 | 409,600 | 41.3 | 11.2 | 620,260 | 59.9 | 11.5 |
| Black non-Hispanic | 28,370 | 2.7 | 0.1 | 27,360 | 3.7 | 0.4 | 21,190 | 2.0 | 0.7 | 56,740 | 5.7 | 1.5 | 29,900 | 2.9 | 0.5 |
| AIAN non-Hispanic | 5,310 | 0.5 | 0.0 | 2,605 | 0.4 | 0.0 | 1,715 | 0.2 | 0.0 | 3,220 | 0.3 | 0.1 | 3,085 | 0.3 | 0.1 |
| Asian non-Hispanic | 32,560 | 3.0 | 0.1 | 73,840 | 9.8 | 1.3 | 112,910 | 7.9 | 6.3 | 67,475 | 6.7 | 1.9 | 34,505 | 3.2 | 0.8 |
| NHOPI non-Hispanic | 3,475 | 0.3 | 0.0 | 3,165 | 0.4 | 0.0 | 2,730 | 0.3 | 0.1 | 4,080 | 0.4 | 0.1 | 3,205 | 0.3 | 0.1 |
| Black & White non-Hispanic | 1,110 | 0.1 | 0.0 | 835 | 0.1 | 0.0 | 535 | 0.1 | 0.0 | 1,395 | 0.1 | 0.0 | 1,535 | 0.1 | 0.0 |
| AIAN & White non-Hispanic | 4,320 | 0.4 | 0.0 | 2,915 | 0.4 | 0.0 | 1,840 | 0.2 | 0.1 | 2,775 | 0.3 | 0.1 | 2,795 | 0.3 | 0.0 |
| AIAN & Black non-Hispanic | 380 | 0.0 | 0.0 | 280 | 0.0 | 0.0 | 180 | 0.0 | 0.0 | 845 | 0.1 | 0.0 | 545 | 0.1 | 0.0 |
| Asian & White non-Hispanic | 2,410 | 0.2 | 0.0 | 3,000 | 0.4 | 0.0 | 1,995 | 0.2 | 0.1 | 1,955 | 0.2 | 0.1 | 2,110 | 0.2 | 0.0 |
| Balance 2+ Races, non-Hispanic | 5,705 | 0.5 | 0.0 | 4,540 | 0.6 | 0.0 | 4,380 | 0.4 | 0.2 | 5,805 | 0.6 | 0.1 | 4,765 | 0.4 | 0.1 |

Source: US Census Bureau, Census 2010 special tabulation - Data based on where people live.

10.3.2 EMPLOYMENT IN APPRENTICABLE EEO PROFESSIONAL OCCUPATIONS

A. San Francisco-Oakland-Fremont MSA

Table 10.5 summarizes employment in selected apprenticeable EEO professional occupations in 2010 for the San Francisco-Oakland-Fremont MSA. Whites dominated Professional categories, over 50 percent representation in every category, except Technicians, where they represent 45.9 percent. Asian Americans largely represent the minority presence in the San Francisco-Oakland-Fremont MSA. Asian Americans are represented in Science, Engineering, Computer and Healthcare practice professions in the largest proportions (37.8 percent), while the presence in other areas of Management, Business and Financial workers (20.5 percent) and Technicians (32.3 percent) is also very prominent. Hispanic Americans are slightly higher in professional service occupations, compared to African Americans in the San Francisco-Oakland-Fremont MSA. Hispanic Americans are largely represented as Technicians (at 11.1 percent), Management, Business and Financial workers (at 9.4 percent) and other professional service jobs (at 9.9 percent). African Americans represent about 3 to 5.8 percent of most professional service jobs in the San Francisco-Oakland-Fremont MSA.

B. State of California

Table 10.6 reflects professional employment for the entire State of California. Whites representation in Professional categories mirrored the San Francisco-Oakland-Fremont MSA, where they represented over 50 percent in every category, except Technicians at 46.4 percent.

Among non-Hispanic minorities, Asian Americans largely represented non-Hispanic minorities, with the highest levels of representation in Science, Engineering and Computer Professionals (32 percent), Healthcare Practitioner Professionals (29.1 percent) and Technicians (23.4 percent), which is consistent with representation in the San Francisco-Oakland-Fremont MSA. Asian American females make up the majority of the representation in the Healthcare Practitioner Professionals and half of Technicians.

Hispanic Americans at 15.3 percent reflect a larger representation than Asian Americans at 14.3 percent in Management, Business and Financial Services. The next highest level of representation is as Technicians (20.8 percent), followed by Other Professional Workers (16.7 percent).

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Conversely, African Americans did not exceed 6.3 percent in any professional category.

Healthcare Practitioner professions include a larger presence of women than men with an almost equal or larger presence in Technician positions, with minority women largely occupied in these areas in the San Francisco-Oakland-Fremont MSA and the State.

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Table 10.5.
Employment in Selected Apprenticable EEO Professional Occupations (1 of 2)
By Hispanic Origin and Race, 2010
San Francisco-Oakland-Fremont CA MSA

| Occupation | Management, Business and Financial Workers | | | Science, Engineering and Computer Professionals | | | Healthcare Practitioner Professionals | | | Other Professional Workers | | | Technicians | | | |
|---------------------------------------|--|------------|-----------|---|------------|-----------|---------------------------------------|------------|-----------|----------------------------|------------|-----------|-------------|------------|-----------|-------------|
| | Race/Ethnicity/ Gender | Total # | Male % | Female % | Total # | Male % | Female % | Total # | Male % | Female % | Total # | Male % | Female % | Total # | Male % | Female % |
| Total | | 365,475 | 56.6 | 43.4 | 168,525 | 74.2 | 25.8 | 79,625 | 30.0 | 70.0 | 311,130 | 40.2 | 59.8 | 57,995 | 54.1 | 45.9 |
| White non-Hispanic | | 223,855 | 36.6 | 24.7 | 85,310 | 38.1 | 12.5 | 42,505 | 17.1 | 36.3 | 194,355 | 26.6 | 35.9 | 26,510 | 27.6 | 18.1 |
| Hispanic | | 34,330 | 5.1 | 4.3 | 9,285 | 4.1 | 1.4 | 5,175 | 1.7 | 4.7 | 30,805 | 3.6 | 6.3 | 6,435 | 5.7 | 5.4 |
| Black non-Hispanic | | 20,245 | 2.4 | 3.1 | 5,315 | 2.3 | 0.8 | 3,915 | 1.3 | 3.6 | 19,525 | 2.5 | 3.8 | 3,330 | 2.4 | 3.3 |
| AIAN non-Hispanic | | 855 | 0.1 | 0.1 | 180 | 0.1 | 0.0 | 60 | 0.1 | 0.0 | 470 | 0.1 | 0.1 | 135 | 0.1 | 0.2 |
| Asian non-Hispanic | | 74,835 | 11.0 | 9.5 | 63,720 | 27.4 | 10.4 | 25,870 | 9.3 | 23.2 | 55,655 | 6.1 | 11.8 | 18,710 | 15.7 | 16.6 |
| NHOPI non-Hispanic | | 1,895 | 0.2 | 0.3 | 340 | 0.1 | 0.1 | 230 | 0.0 | 0.3 | 890 | 0.1 | 0.1 | 550 | 0.5 | 0.4 |
| Black & White non-Hispanic | | 890 | 0.1 | 0.1 | 335 | 0.2 | 0.0 | 95 | 0.0 | 0.1 | 1,010 | 0.1 | 0.2 | 235 | 0.2 | 0.2 |
| AIAN & White non-Hispanic | | 1,115 | 0.2 | 0.1 | 535 | 0.2 | 0.1 | 265 | 0.1 | 0.2 | 1,175 | 0.2 | 0.2 | 245 | 0.1 | 0.3 |
| AIAN & Black non-Hispanic | | 500 | 0.1 | 0.1 | 70 | 0.0 | 0.0 | 60 | 0.0 | 0.1 | 380 | 0.1 | 0.1 | 165 | 0.2 | 0.1 |
| Asian & White non-Hispanic | | 3,745 | 0.5 | 0.6 | 1,805 | 0.8 | 0.3 | 735 | 0.2 | 0.7 | 3,280 | 0.4 | 0.6 | 1,040 | 0.8 | 0.9 |
| Balance 2+ Races, non-Hispanic | | 3,210 | 0.4 | 0.5 | 1,630 | 0.7 | 0.2 | 705 | 0.3 | 0.6 | 3,585 | 0.5 | 0.7 | 645 | 0.7 | 0.4 |

Source: US Census Bureau, Census 2010 special tabulation - Data based on where people live.

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Table 10.6.
Employment in Selected Apprenticeable EEO Professional Occupations (1 of 2)
By Hispanic Origin and Race, 2000
State of California

| Occupation | Management, Business and Financial Workers | | | Science, Engineering and Computer Professionals | | | Healthcare Practitioner Professionals | | | Other Professional Workers | | | Technicians | | |
|---------------------------------------|--|------------|-----------|---|------------|-----------|---------------------------------------|------------|-----------|----------------------------|------------|-----------|-------------|------------|-----------|
| | Race/Ethnicity/ Gender | Total # | Male % | Female % | Total # | Male % | Female % | Total # | Male % | Female % | Total # | Male % | Female % | Total # | Male % |
| Total | 2,283,685 | 58.7 | 41.3 | 827,650 | 76.4 | 23.6 | 518,360 | 31.3 | 68.7 | 2,062,235 | 40.6 | 59.4 | 441,475 | 51.8 | 48.2 |
| White non-Hispanic | 1,396,570 | 37.4 | 23.7 | 440,870 | 41.7 | 11.5 | 274,875 | 17.7 | 35.3 | 1,264,400 | 26.0 | 35.3 | 204,695 | 25.8 | 20.6 |
| Hispanic | 393,305 | 9.7 | 7.6 | 72,930 | 6.8 | 2.1 | 53,130 | 2.7 | 7.5 | 345,420 | 6.1 | 10.6 | 91,515 | 10.0 | 10.8 |
| Black non-Hispanic | 107,850 | 2.2 | 2.5 | 26,000 | 2.3 | 0.9 | 26,185 | 1.2 | 3.8 | 119,905 | 2.4 | 3.5 | 27,540 | 2.6 | 3.7 |
| AIAN non-Hispanic | 8,050 | 0.2 | 0.2 | 1,870 | 0.2 | 0.0 | 1,220 | 0.1 | 0.2 | 6,410 | 0.1 | 0.2 | 1,505 | 0.2 | 0.2 |
| Asian non-Hispanic | 326,020 | 8.1 | 6.2 | 265,195 | 23.6 | 8.4 | 150,870 | 8.9 | 20.2 | 272,890 | 5.0 | 8.3 | 103,155 | 11.9 | 11.5 |
| NHOPI non-Hispanic | 6,855 | 0.1 | 0.2 | 2,040 | 0.2 | 0.1 | 1,045 | 0.0 | 0.2 | 4,460 | 0.1 | 0.1 | 1,760 | 0.2 | 0.2 |
| Black & White non-Hispanic | 3,955 | 0.1 | 0.1 | 1,135 | 0.1 | 0.0 | 585 | 0.0 | 0.1 | 5,970 | 0.1 | 0.2 | 1,095 | 0.1 | 0.1 |
| AIAN & White non-Hispanic | 8,490 | 0.2 | 0.2 | 2,665 | 0.2 | 0.1 | 1,720 | 0.1 | 0.3 | 9,135 | 0.2 | 0.3 | 1,885 | 0.2 | 0.3 |
| AIAN & Black non-Hispanic | 1,895 | 0.0 | 0.0 | 460 | 0.0 | 0.0 | 195 | 0.0 | 0.0 | 2,075 | 0.0 | 0.1 | 535 | 0.1 | 0.1 |
| Asian & White non-Hispanic | 14,885 | 0.3 | 0.3 | 7,625 | 0.7 | 0.2 | 3,760 | 0.2 | 0.5 | 15,435 | 0.3 | 0.4 | 3,825 | 0.5 | 0.4 |
| Balance 2+ Races, non-Hispanic | 15,815 | 0.4 | 0.3 | 6,855 | 0.6 | 0.2 | 4,775 | 0.3 | 0.6 | 16,130 | 0.3 | 0.5 | 3,965 | 0.4 | 0.5 |

Source: US Census Bureau, Census 2010 special tabulation - Data based on where people live.

10.3.3 EMPLOYMENT IN APPRENTICEABLE EEO SUPPORT SERVICE OCCUPATIONS

A. San Francisco-Oakland-Fremont MSA

In Support Service occupations as reflected in Tables 10.7, Whites' representation ranges from 28 percent among Service Workers to 50.8 percent among Sales Workers. Asian Americans lead minorities in the San Francisco-Oakland-Fremont MSA with a 17.3 percent to 24.8 percent presence in the various positions. Hispanic Americans are a close second, ranging from 14.7 percent to 35.2 percent. The presence is highest (35.2 percent) in the category of Service Jobs, Except Protective. African Americans are highest in Protective Service occupations (19.4 percent) and lowest in Sales (6.5 percent). Minority women are mostly in Administrative Support and in Services, other than Protective Services.

B. State of California

Unlike the San Francisco-Oakland-Fremont MSA, in the State (Table 10.8), Hispanic Americans dominate the Support Service occupations, with over 28 percent presence in all areas. Asian Americans are a distant second, at only 7.3 percent in Protective Services, but roughly 13 percent in Sales, Administrative support and in Service Workers, Except Protective Services. In contrast, African Americans have the highest Support Service presence in Protective Services (12.7 percent) and the least in Sales occupations (5.0 percent) in the State. Whites' representation did not reach 50 percent in any Support Service occupation.

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Table 10.7.
Employment in Selected Apprenticeable EEO Support Service Occupations (2 of 2)
By Hispanic Origin and Race, 2010
San Francisco-Oakland-Fremont CA MSA

| Occupation | Sales Workers | | | Administrative Support Workers | | | Protective Service Workers | | | Service Workers, except Protective | | |
|--------------------------------|---------------|------|--------|--------------------------------|------|--------|----------------------------|------|--------|------------------------------------|------|--------|
| | Total | Male | Female | Total | Male | Female | Total | Male | Female | Total | Male | Female |
| Race/Ethnicity/Gender | # | % | % | # | % | % | # | % | % | # | % | % |
| Total | 256,365 | 52.7 | 47.3 | 327,660 | 30.0 | 70.0 | 36,800 | 77.3 | 22.7 | 304,585 | 39.2 | 60.8 |
| White non-Hispanic | 130,290 | 28.9 | 21.9 | 137,140 | 11.3 | 30.5 | 15,455 | 33.6 | 8.4 | 85,385 | 10.3 | 17.7 |
| Hispanic | 43,740 | 7.9 | 9.1 | 60,925 | 5.9 | 12.6 | 5,420 | 10.8 | 3.9 | 107,260 | 14.6 | 20.6 |
| Black non-Hispanic | 16,770 | 2.9 | 3.6 | 34,625 | 3.0 | 7.6 | 7,135 | 14.0 | 5.4 | 26,110 | 3.2 | 5.4 |
| AIAN non-Hispanic | 565 | 0.1 | 0.1 | 970 | 0.1 | 0.2 | 175 | 0.3 | 0.2 | 915 | 0.1 | 0.2 |
| Asian non-Hispanic | 56,635 | 11.3 | 10.8 | 81,300 | 8.7 | 16.1 | 6,370 | 13.9 | 3.4 | 75,365 | 9.9 | 14.9 |
| NHOPI non-Hispanic | 1,460 | 0.2 | 0.3 | 3,355 | 0.3 | 0.7 | 715 | 1.5 | 0.5 | 2,475 | 0.2 | 0.6 |
| Black & White non-Hispanic | 810 | 0.2 | 0.1 | 1,245 | 0.1 | 0.3 | 125 | 0.3 | 0.0 | 990 | 0.1 | 0.2 |
| AIAN & White non-Hispanic | 910 | 0.1 | 0.2 | 945 | 0.1 | 0.2 | 260 | 0.5 | 0.2 | 685 | 0.1 | 0.1 |
| AIAN & Black non-Hispanic | 390 | 0.1 | 0.1 | 405 | 0.0 | 0.1 | 115 | 0.3 | 0.0 | 320 | 0.0 | 0.1 |
| Asian & White non-Hispanic | 2,200 | 0.4 | 0.5 | 2,745 | 0.2 | 0.6 | 575 | 1.3 | 0.3 | 1,745 | 0.2 | 0.4 |
| Balance 2+ Races, non-Hispanic | 2,595 | 0.5 | 0.5 | 4,010 | 0.3 | 0.9 | 450 | 1.0 | 0.3 | 3,330 | 0.4 | 0.7 |

Source: US Census Bureau, Census 2010 special tabulation - Data based on where people live.

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Table 10.8.
Employment in Selected Apprenticeship EEO Support Service Occupations (2 of 2)
By Hispanic Origin and Race, 2000
State of California

| Occupation | Sales Workers | | | Administrative Support Workers | | | Protective Service Workers | | | Service Workers, except Protective | | |
|---------------------------------------|---------------|------|--------|--------------------------------|------|--------|----------------------------|------|--------|------------------------------------|------|--------|
| | Total | Male | Female | Total | Male | Female | Total | Male | Female | Total | Male | Female |
| Race/Ethnicity/Gender | # | % | % | # | % | % | # | % | % | # | % | % |
| Total | 2,097,545 | 51.6 | 48.4 | 2,752,860 | 28.9 | 71.1 | 378,645 | 79.9 | 20.1 | 2,510,735 | 36.9 | 63.1 |
| White non-Hispanic | 1,022,925 | 27.2 | 21.5 | 1,193,460 | 10.8 | 32.6 | 179,045 | 38.7 | 8.6 | 770,190 | 10.8 | 19.9 |
| Hispanic | 634,490 | 13.7 | 16.5 | 905,735 | 10.3 | 22.7 | 107,605 | 22.5 | 6.0 | 1,188,895 | 17.9 | 29.4 |
| Black non-Hispanic | 104,845 | 2.4 | 2.6 | 210,755 | 2.3 | 5.3 | 48,290 | 9.4 | 3.3 | 152,330 | 2.2 | 3.9 |
| AIAN non-Hispanic | 7,570 | 0.2 | 0.2 | 12,405 | 0.1 | 0.4 | 3,055 | 0.6 | 0.2 | 10,920 | 0.1 | 0.3 |
| Asian non-Hispanic | 273,085 | 6.8 | 6.2 | 351,955 | 4.6 | 8.2 | 27,645 | 6.1 | 1.2 | 325,940 | 4.9 | 8.0 |
| NHOPI non-Hispanic | 6,550 | 0.1 | 0.2 | 14,800 | 0.2 | 0.4 | 2,980 | 0.6 | 0.2 | 10,805 | 0.1 | 0.3 |
| Black & White non-Hispanic | 6,565 | 0.1 | 0.2 | 8,015 | 0.1 | 0.2 | 1,375 | 0.3 | 0.1 | 5,945 | 0.1 | 0.1 |
| AIAN & White non-Hispanic | 8,285 | 0.2 | 0.2 | 11,185 | 0.1 | 0.3 | 1,990 | 0.4 | 0.1 | 10,395 | 0.1 | 0.3 |
| AIAN & Black non-Hispanic | 1,625 | 0.0 | 0.0 | 2,305 | 0.0 | 0.1 | 515 | 0.1 | 0.0 | 2,400 | 0.0 | 0.1 |
| Asian & White non-Hispanic | 14,405 | 0.3 | 0.4 | 17,320 | 0.2 | 0.4 | 2,610 | 0.5 | 0.2 | 12,900 | 0.2 | 0.3 |
| Balance 2+ Races, non-Hispanic | 17,195 | 0.4 | 0.4 | 24,920 | 0.3 | 0.6 | 3,540 | 0.7 | 0.3 | 20,010 | 0.3 | 0.5 |

Source: US Census Bureau, Census 2010 special tabulation - Data based on where people live.

10.4 ANALYSIS OF REED CONSTRUCTION DATA

In showing an additional source of DBE, SB and MWBE participation in marketplace construction activity, M³ Consulting collected information maintained by the private firm of Reed Elsevier (Reed), which surveys construction-related activity in various regions around the United States. A substantial portion of the Reed data relates to bid activity, and significantly more so for projects owned by public entities than for private owners³⁶⁴. M³ Consulting, however, analyzed all projects submitted, both public and private. In the case of the data M³ Consulting received from Reed, the selected geographic region for analysis as the San Francisco-Oakland-Fremont MSA and the San Jose-San Francisco-Oakland CSA.

Most importantly, the dollar value of those projects that are available in Reed are only based on the owner and cannot be apportioned to the contractor (such as architect, construction manager, engineer, general contractor or subcontractor) level. This limits the analysis. The details about the data submitted by Reed Elsevier are presented in **Chapter IV, Statistical Methodology**.

10.4.1 COMPARISON OF PRIVATE AND PUBLIC OWNERS OF PROJECT VALUES AND CONTRACTORS

As shown in Table 10.9, a total of \$94.5 billion was reported across 7,082 construction projects by Reed data in the San Francisco-Oakland-Fremont MSA by various agencies in the public and private sectors. Over 82.91 percent were public sector, with only 17.09 percent reflecting private sector projects. In terms of dollars, private sector projects accounted for 11.66 percent (\$11 billion) and the remaining 88.34 percent (\$83.56 billion) were public sector projects in the San Francisco-Oakland-Fremont MSA.

³⁶⁴This may be a function of the ease with which public records may be accessed as opposed to bid documents of private owners that may be protected from public scrutiny.

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Table 10.9.
Counts and Project Value of Unique Projects
By Project Owner
San Francisco-Oakland-Fremont CA MSA
2012 – 2015

| Project Owner | # | % | \$ | % |
|---------------|--------------|---------------|-----------------------|---------------|
| Private | 1,210 | 17.09 | 11,033,942,245 | 11.66 |
| Public | 5,872 | 82.91 | 83,561,734,341 | 88.34 |
| Total | 7,082 | 100.00 | 94,595,676,586 | 100.00 |

Source: Reed Data 2012-2015

Within the San Jose-San Francisco-Oakland CA CSA, a total of 11,722 projects valued at \$103.4 billion dollars in construction projects were reported by various agencies in the public and private sectors, as reflected in Table 10.10. Public sector projects were close to 83 percent of total projects awarded and private sector projects comprised the remaining 17 percent. The dollar values for projects within the CSA followed a similar pattern with private sector at 13.6 percent (\$14 billion) and public sector projects at 86.4 percent (\$89.3 billion).³⁶⁵

Table 10.10.
Counts and Project Value of Unique Projects
By Project Owner
San Jose-San Francisco-Oakland CA CSA
2012 – 2015

| Project Owner | # | % | \$ | % |
|---------------|---------------|---------------|------------------------|---------------|
| Private | 2,032 | 17.26 | 14,058,997,587 | 13.60 |
| Public | 9,740 | 82.74 | 89,315,795,502 | 86.40 |
| Total | 11,722 | 100.00 | 103,374,793,089 | 100.00 |

Source: Reed Data 2012-2015

³⁶⁵ Detailed information identifying particular public agencies reporting data was not available.

10.4.2 AVAILABILITY BY RACE/HISPANIC ORIGIN/GENDER AND ROLE

One of the main purposes of presenting the Reed data is to gain insight into the penetration of minority- and women-owned firms in the private sector. Arguably, if construction firms are doing business and being awarded contracts in the private sector, then they are potentially available to do business with BART. Therefore, below is an examination of particular categories of construction firms by race, ethnicity and gender.³⁶⁶

Tables 10.11 below presents a discrete list of construction and A&E firms by project role on public and private sector projects let within the San Francisco-Oakland-Fremont, MSA, based on Reed data. Of a total of 298 architectural and 115 engineering firms, Non-S/M/W/DBE firms comprise 82.55 percent and 77.18 percent of the total firms selected. There are a total of 17 MBE Architects, followed by seven Caucasian female-owned firms, 26 D&B MWBEs and 13 non-minority SBEs selected for the FY 2012-15 period. For the same geography and time period, there were 14 MBEs firms, three Caucasian Female-owned firms, 12 D&B MWBEs and four non-minority SBE Engineering firms selected based on Reed data.

In Construction Management, just over 25 percent of the firms are MWBE firms. For the 2012-15 period, these Construction Management firms include only one Hispanic American-owned firm, four Asian American-owned firm and 3 African American-owned firm, two Other MBEs and three Caucasian Female-owned firms in the San Francisco-Oakland-Fremont MSA. In addition, there were four D&B MWBE firms and four non-minority SBEs who were available as Construction Management firms.

While General Contracting data reflected 121 MWBEs, these firms represented only 8.37 percent of all available firms reported by Reed in Private and Public Sector contracts in the San Francisco-Oakland-Fremont MSA. The 121 MWBEs included 39 African American-owned firms, 40 Hispanic American-owned firms, 19 Asian American-owned firms, six Other MBEs, 13 Caucasian Female-owned firms, and four Other Certified MWBE firms. An additional 133 D&B MWBEs and 30 non-minority SBEs were also available in the San Francisco-Oakland-Fremont MSA as General Contractors. However, collectively, Total MWBEs, D&B MWBEs and SBEs (284) accounted for less than 20 percent of all General Contracting firms in the San Francisco-Oakland-Fremont MSA.

Since MWBEs often participate as Subcontractors, we note that of the 1,537 subcontractors reported by Reed in the San Francisco-Oakland-Fremont MSA, only 176 (11 percent) are represented among Total MWBE, D&B MWBE and non-minority SBE subcontractors. The 176 firms include 82 MWBE firms that accounted for 5.34 percent of all subcontractors, 73

³⁶⁶ Race, ethnicity and gender were identified through race/gender information provided within the Reed database, as well as by cross matching the Reed data against the Master S/M/W/DBE certification list.

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(4.75 percent) D&B MWBEs and 21 (1.37 percent) non-minority SBEs. The 82 MWBEs include 20 African American-owned firms, 23 Hispanic American-owned firms, 15 Asian American owned firms, nine Other MBEs and 15 Caucasian Female-owned firms.

Table 10.11.
Firm Availability by Role
San Francisco-Oakland-Fremont CA MSA
FY 2012 – FY 2015

| Ethnicity | Architect | | Construction Manager | | Engineer | | General Contractor | | Subcontractor | |
|-----------------------------|-----------|--------|----------------------|--------|----------|--------|--------------------|--------|---------------|--------|
| | # | % | # | % | # | % | # | % | # | % |
| Non-S/M/W/DBE | 298 | 82.55 | 70 | 74.47 | 115 | 77.18 | 1,162 | 80.36 | 1,361 | 88.55 |
| African American | 5 | 1.39 | 3 | 3.19 | 3 | 2.01 | 39 | 2.70 | 20 | 1.30 |
| Asian American | 8 | 2.22 | 4 | 4.26 | 8 | 5.37 | 19 | 1.31 | 15 | 0.98 |
| Hispanic American | 3 | 0.83 | 1 | 1.06 | 2 | 1.34 | 40 | 2.77 | 23 | 1.50 |
| Other MBE | 1 | 0.28 | 2 | 2.13 | 1 | 0.67 | 6 | 0.41 | 9 | 0.59 |
| Total MBE | 17 | 4.71 | 10 | 10.64 | 14 | 9.40 | 104 | 7.19 | 67 | 4.36 |
| Caucasian Female | 7 | 1.94 | 3 | 3.19 | 3 | 2.01 | 13 | 0.90 | 15 | 0.98 |
| Other Certified MWBE | | 0.00 | 3 | 3.19 | 1 | 0.67 | 4 | 0.28 | 0 | 0.00 |
| Total MWBE | 24 | 6.65 | 16 | 17.02 | 18 | 12.08 | 121 | 8.37 | 82 | 5.34 |
| D&B MWBE | 26 | 7.20 | 4 | 4.26 | 12 | 8.05 | 133 | 9.20 | 73 | 4.75 |
| SBE | 13 | 3.60 | 4 | 4.26 | 4 | 2.68 | 30 | 2.07 | 21 | 1.37 |
| Grand Total | 361 | 100.00 | 94 | 100.00 | 149 | 100.00 | 1,446 | 100.00 | 1,537 | 100.00 |

Source: Reed Data 2012-2015; M³ Consulting, Inc.

Table 10.12 presents the same data for a larger geographical area, the San Jose-San Francisco-Oakland CA CSA (hereafter, CSA). While the number of available MWBEs are higher due to the increased geographical area, the percent of available MWBEs as Architects/Engineers/Construction Managers/General Contractors/Subcontractors does not appear to vary much from the discussion above in the San Francisco-Oakland-Fremont MSA. A total of 26 (5.46 percent Architects), 22 (12.5 percent) Engineers, 17 (12.5 percent) Construction Managers, 153 (7.35 percent) General Contractors and 49 (7.26 percent) Subcontractors are MWBEs. No single MWBE group exceeded 2 percent of the total available firms in the CSA for any of the roles listed below, except in Engineering, where there were five (2.76 percent) African American-owned firms, nine (4.97 percent) Asian American-owned firms that were above the two percent of available MWBEs.

Table 10.12.
Firms Availability by Role
San Jose-San Francisco-Oakland CA CSA
FY 2007 – FY 2009

| Ethnicity | Architect | | Construction Manager | | Engineer | | General Contractor | | Subcontractor | |
|----------------------|-----------|--------|----------------------|--------|----------|--------|--------------------|--------|---------------|--------|
| | # | % | # | % | # | % | # | % | # | % |
| Non-S/M/W/DBE | 407 | 85.50 | 111 | 81.62 | 142 | 78.45 | 1,726 | 82.94 | 551 | 81.63 |
| African American | 5 | 1.05 | 3 | 2.21 | 5 | 2.76 | 41 | 1.97 | 12 | 1.78 |
| Asian American | 8 | 1.68 | 4 | 2.94 | 9 | 4.97 | 28 | 1.35 | 12 | 1.78 |
| Hispanic American | 4 | 0.84 | 1 | 0.74 | 3 | 1.66 | 46 | 2.21 | 9 | 1.33 |
| Other MBE | 1 | 0.21 | 3 | 2.21 | 1 | 0.55 | 12 | 0.58 | 7 | 1.04 |
| Total MBE | 18 | 3.78 | 11 | 8.09 | 18 | 9.94 | 127 | 6.10 | 40 | 5.93 |
| Caucasian Female | 8 | 1.68 | 3 | 2.21 | 3 | 1.66 | 17 | 0.82 | 9 | 1.33 |
| Other Certified MWBE | | 0.00 | 3 | 2.21 | 1 | 0.55 | 9 | 0.43 | 0 | 0.00 |
| Total MWBE | 26 | 5.46 | 17 | 12.50 | 22 | 12.15 | 153 | 7.35 | 49 | 7.26 |
| D&B MWBE | 29 | 6.09 | 4 | 2.94 | 13 | 7.18 | 169 | 8.12 | 58 | 8.59 |
| SBE | 14 | 2.94 | 4 | 2.94 | 4 | 2.21 | 33 | 1.59 | 17 | 2.52 |
| Grand Total | 476 | 100.00 | 136 | 100.00 | 181 | 100.00 | 2,081 | 100.00 | 675 | 100.00 |

Source: Reed Data 2012-2015; M³ Consulting, Inc.

10.4.3 COMPARISON OF BID ACTIVITY AND BIDDERS ACROSS PUBLIC OWNERS OF PROJECTS

Ranking of bidders reflects the decision rates of owners in determining the winning bidder (awardee). In the public sector, within the San Francisco-Oakland-Fremont MSA, there are close to 10 percent of MBEs that are ranked #1 in the bidding process by the various public agencies reporting data to Reed Construction (See Table 10.13). These include 238 Hispanic American-owned firms (6.91 percent), 79 (2.29 percent) Asian American owned and only 14 (0.41 percent) African American owned firms. In addition, 27 (0.78 percent) Caucasian Female-owned firms, 87 non-minority SBEs (2.52 percent) and 641 D&B MWBEs (18.6 percent) are also ranked #1 in the bidding process. The lower rankings of #2 and #3 does not appear to reflect any difference in pattern. A total of 335 (11.66 percent) and 241 (10.20 percent) MWBEs are ranked as #2 and #3 in the bidding process within the San Francisco-Oakland-Fremont MSA.

There was very limited bidder data reported for private sector projects, as such M³ Consulting is not reporting this data.

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Table 10.13.
Distribution of MWBEs by Bidder Ranking
By Project Owner: Public
San Francisco-Oakland-Fremont CA MSA
FY 2012 – FY 2015

| Ethnicity | MSA | | | | | |
|----------------------|---------|--------|---------|--------|---------|--------|
| | Rank #1 | | Rank #2 | | Rank #3 | |
| | # | % | # | % | # | % |
| Non-S/M/W/DBE | 2,353 | 68.28 | 1,893 | 65.87 | 1,574 | 66.61 |
| African American | 14 | 0.41 | 18 | 0.63 | 10 | 0.42 |
| Asian American | 79 | 2.29 | 65 | 2.26 | 36 | 1.52 |
| Hispanic American | 238 | 6.91 | 232 | 8.07 | 179 | 7.58 |
| Other MBE | 3 | 0.09 | 2 | 0.07 | 2 | 0.08 |
| Total MBE | 334 | 9.69 | 317 | 11.03 | 227 | 9.61 |
| Caucasian Female | 27 | 0.78 | 13 | 0.45 | 9 | 0.38 |
| Other Certified MWBE | 4 | 0.12 | 5 | 0.17 | 5 | 0.21 |
| Total MWBE | 365 | 10.59 | 335 | 11.66 | 241 | 10.20 |
| D&B MWBE | 641 | 18.60 | 538 | 18.72 | 460 | 19.47 |
| SBE | 87 | 2.52 | 108 | 3.76 | 88 | 3.72 |
| Grand Total | 3,446 | 100.00 | 2,874 | 100.00 | 2,363 | 100.00 |

Source: Reed Data 2012-2015; M³ Consulting, Inc.

Private Sector data not included due to sparsity of data

Based on Table 10.14, there is not much difference in ranking in the bidding process within the CSA, with a lower (9.5 percent or less) proportion of MBEs ranked as number 1, 2 and 3. Among the MBEs, Hispanic American-owned firms seem to dominate the public sector in the bid process within the CSA, with Asian American and Caucasian Female-owned firms following. Very few African American-owned firms seem to be ranked in the top three in the bidding process, representing less than 0.4 percent in #1, 0.65 percent in #2 and 0.33 percent in #3.

Table 10.14.
Distribution of M/WBEs by Bidder Ranking
By Project Owner: Public
San Jose-San Francisco-Oakland CA CSA
FY 2007 – FY 2009

| Ethnicity | CSA | | | | | |
|----------------------|---------|--------|---------|--------|---------|--------|
| | Rank #1 | | Rank #2 | | Rank #3 | |
| | # | % | # | % | # | % |
| Non-S/M/W/DBE | 3,634 | 74.03 | 2,832 | 72.41 | 2,383 | 72.52 |
| African American | 19 | 0.39 | 25 | 0.64 | 11 | 0.33 |
| Asian American | 82 | 1.67 | 68 | 1.74 | 37 | 1.13 |
| Hispanic American | 293 | 5.97 | 265 | 6.78 | 237 | 7.21 |
| Other MBE | 10 | 0.20 | 12 | 0.31 | 9 | 0.27 |
| Total MBE | 404 | 8.23 | 370 | 9.46 | 294 | 8.95 |
| Caucasian Female | 34 | 0.69 | 14 | 0.36 | 13 | 0.40 |
| Other Certified MWBE | 4 | 0.08 | 5 | 0.13 | 5 | 0.15 |
| Total MWBE | 442 | 9.00 | 389 | 9.95 | 312 | 9.49 |
| D&B MWBE | 716 | 14.59 | 585 | 14.96 | 501 | 15.25 |
| SBE | 117 | 2.38 | 105 | 2.68 | 90 | 2.74 |
| Grand Total | 4,909 | 100.00 | 3,911 | 100.00 | 3,286 | 100.00 |

Source: Reed Data 2012-2015; M³ Consulting, Inc.

Private Sector data not included due to sparsity of data

Having a ranking of #1 suggests that those firms actually won the bid. Bid amounts that were ranked as #1 within the San Francisco-Oakland-Fremont MSA are further detailed below in Table 10.15. The total of 365 bids by MWBEs was valued at \$2.4 billion, compared to over \$20 billion by Non-S/M/W/DBEs. As reflected in Table 10.16, the average value per bid for MWBEs was \$6.6 million, whereas for Non-S/M/W/DBEs was \$8.5 million. However, the MWBE bids is skewed largely by Asian American-owned firms that have an average value per bid of \$25.5 million (79 #1 bids by Asian American-owned firms were valued the highest among the MWBEs at \$2 billion). A majority of #1 MWBE bids were submitted by Hispanic American-owned firms at 238 bids, however these 238 bids were only valued at \$339 million (i.e., an average bid of \$1.425 million). Only 14 #1 bids were submitted by African American-owned firms valued at about \$8 million. In contrast to MWBEs overall, the average bid for African American-owned firms was about \$0.5 million and Caucasian Female-owned firms had an average bid of about 0.4 million with 27 public sector bids ranked as #1, valued at about \$11.5 million.

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Table 10.15.
MWBE Value and Count of Rank #1 Bid Amounts
By Project Owner: Public
San Francisco-Oakland-Fremont CA MSA
FY 2012 – FY 2015

| Ethnicity | MSA | | | | |
|-----------------------------|----------------|-------|--------|-------|-----------------------|
| | \$ | % | Counts | % | Average value per bid |
| Non-S/M/W/DBE | 20,013,840,769 | 83.04 | 2,353 | 67.77 | 8,505,670 |
| African American | 8,278,743 | 0.03 | 14 | 0.4 | 591,339 |
| Asian American | 2,017,057,988 | 8.37 | 79 | 2.28 | 25,532,380 |
| Hispanic American | 339,152,631 | 1.41 | 238 | 6.85 | 1,425,011 |
| Other MBE | 321,134 | 0 | 3 | 0.09 | 107,045 |
| Total MBE | 2,364,810,496 | 9.81 | 334 | 9.62 | 7,080,271 |
| Caucasian Female | 11,533,625 | 0.05 | 27 | 0.78 | 427,171 |
| Other Certified MWBE | 1,643,164 | 0.01 | 4 | 0.12 | 410,791 |
| Total MWBE | 2,377,987,285 | 9.87 | 365 | 10.51 | 6,515,034 |
| D&B MWBE | 1,636,079,139 | 6.79 | 641 | 18.46 | 2,552,386 |
| SBE | 74,916,343 | 0.31 | 113 | 3.25 | 662,976 |
| Grand Total | 24,102,823,536 | 100 | 3,472 | 100 | 6,942,057 |

Source: Reed Data 2012-2015; M³ Consulting, Inc.
 Private Sector data not included due to sparsity of data

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Table 10.16.
MWBE Value and Count of Rank #1 Bid Amounts
By Project Owner: Public
San Jose-San Francisco-Oakland CA CSA
FY 2012 – FY 2015

| Ethnicity | CSA | | | | |
|----------------------|-----------------------|-------------|--------------|-------------|-----------------------|
| | \$ | % | Counts | % | Average value per bid |
| Non-S/M/W/DBE | 24,460,536,296 | 85.44 | 3,634 | 74.03 | 6,731,023 |
| African American | 9,095,917 | 0.03 | 19 | 0.39 | 478,732 |
| Asian American | 2,018,930,794 | 7.05 | 82 | 1.67 | 24,621,107 |
| Hispanic American | 363,578,297 | 1.27 | 293 | 5.97 | 1,240,882 |
| Other MBE | 5,642,222 | 0.02 | 10 | 0.2 | 564,222 |
| Total MBE | 2,397,247,230 | 8.37 | 404 | 8.23 | 5,933,780 |
| Caucasian Female | 13,345,924 | 0.05 | 34 | 0.69 | 392,527 |
| Other Certified MWBE | 1,643,164 | 0.01 | 4 | 0.08 | 410,791 |
| Total MWBE | 2,412,236,318 | 8.43 | 442 | 9 | 5,457,548 |
| D&B MWBE | 1,680,899,428 | 5.87 | 716 | 14.59 | 2,347,625 |
| SBE | 75,949,620 | 0.27 | 117 | 2.38 | 649,142 |
| Grand Total | 28,629,621,662 | 100 | 4,909 | 100 | 5,832,068 |

Source: Reed Data 2012-2015; M³ Consulting, Inc.
 Private Sector data not included due to sparsity of data

Similar to those bids Ranked as #1 in the San Francisco-Oakland-Fremont MSA were those ranked #1 in the CSA as seen in Table 10.16. Of the total of 4,909 public sector bids ranked as #1, 442 (9 percent) of the bids and about 15 percent in terms of bid value included MWBEs, D&B MWBEs, and non-minority SBEs. The total bid amounts by MWBEs was about \$2.4 billion (8.43 percent), compared to over \$24 billion by Non-S/M/W/DBEs.

A majority of the bid amounts among the MWBEs were by Asian American (\$2 billion via 82 bids), with about \$363.6 million (in 293 bids) and \$9 million (in 19 bids) by Hispanic American- and African American-owned firms, respectively. Only 0.05 percent of the bid amounts ranked as #1 were from 34 bids by Caucasian Female-owned firms. D&B MWBEs had about \$1.68 billion in 716 bids and the 117 bids by non-minority SBEs was valued at 75.9 million in bid amounts that were among those bids ranked as #1 in public sector contracts.

The average value per bid was \$6.7 million for Non-S/M/W/DBEs whereas for MWBEs it is \$5.7 million although as was seen in Table 10.15, the average bid for the latter group is skewed perhaps by Asian American-owned firms that have a higher average bid than any other group. While Hispanic American-owned firms have an average bid value of \$1.2 million, African American-owned and Caucasian Female-owned firms barely have an average bid value of over half a million. This result is especially interesting in light of comparing these to the thresholds in Table 6.17 where Asian American-owned and Hispanic American-owned firms in construction fared best in low thresholds below \$1.5 million and Asian Americans do not win any contracts over the \$5 million threshold with BART.

The Reed data suggests that there are several large construction opportunities in the public sector for MWBEs. Particularly interesting is that Asian American-owned firm have capacities that far exceed any MWBE group and Non-S/M/W/DBEs as well. However, African American-owned firms and Caucasian Female-owned firms that have lower average bid values, have far exceeded in contract value with BART (Table 6.17) as compared to private and public sector values in Reed data, whereas Asian American-owned firms have not fared as well. Hispanic American-owned firms appear to have performed just as well in the private and public sector based on reed, as they have with BART, but other MWBE groups have been more uneven.

10.5 CITY AND COUNTY OF SAN FRANCISCO BUILDING PERMITS ANALYSIS

The following section analyzes construction activity in the San Francisco-Oakland-Fremont CA MSA market area, as evidenced in the City and County of San Francisco's building

permits data³⁶⁷. In contrast to Reed data above, the building permits data reflects more private sector activity than public sector activity. Reporting under Reed data is voluntary.

10.5.1 COUNT AND VALUE OF BUILDING PERMITS IN PUBLIC AND PRIVATE SECTOR

Building permits are an additional indicator of potential construction contracting activity and owner decision rates in the private and public sectors by the various race, gender and ethnic groups as presented in Tables 10.19 and 10.20. The private sector data reflects the race/ethnicity/gender of the selected prime contractor by the private or public sector owner.³⁶⁸ As reflected by building permit counts in Table 10.25, on private sector projects, only 1,255 building permits were issued to MWBE contractors, which accounted for 1.10 percent of total permits in the private sector, as opposed to 20 building permits issued to MWBEs by the public sector firms, which reflected 5.49 percent of total contracting activity based on permit issuance. These 1,255 permits by MWBEs amounted to \$53 million (or 0.5 percent) of the total in the private sector projects and the 20 permits by the public-sector agencies accounted for \$6.9 million.

The 1,255 MWBE permits in the private sector reflect 315 Asian American-, 118 Hispanic American-, 60 African American-, and 295 Caucasian Female-owned firms, along with 467 Other MBE and Other Certified MWBEs, 3,247 D&B MWBEs and 384 non-minority SBEs, obtained building permits. The public sector witnessed 12 Asian American-, no Hispanic American-, two African American-, and one Caucasian Female-owned firms, along with 49 D&B MWBEs and two non-minority SBEs that obtained permits for construction opportunities. Other than Asian American-owned firms and D&B MWBEs, other minority groups and women seem to have a lower opportunity for construction building permits within the public sector. The data suggest that Hispanic American-owned firms, in particular, had not sought building permits in the public sector for the entire five-year period from FY 2010-2015.

³⁶⁷ This did not include Alameda County and Contra Costa since the former was unresponsive and the latter sent data in unusable formats. Thus these two counties were not included in the data presented.

³⁶⁸ Race/ethnicity/gender for firms receiving building permits identified by cross matching against Master S/M/W/DBE listing. No race/ethnicity/gender information contained within the building permit data.

Table 10.17.
Contractor Data
Count of Commercial Building Permits
City and County of San Francisco
San Francisco-Oakland-Fremont CA MSA
FY 2010 – FY 2015

| | Private Sector | | Public Sector | |
|-----------------------------|----------------|--------|---------------|--------|
| | # | % | # | % |
| Non-S/M/W/DBE | 109,606 | 95.73 | 293 | 80.49 |
| African American | 60 | 0.05 | 2 | 0.55 |
| Asian American | 315 | 0.28 | 12 | 3.30 |
| Hispanic American | 118 | 0.10 | 0 | 0.00 |
| Other MBE | 407 | 0.36 | 1 | 0.27 |
| Total MBE | 900 | 0.79 | 15 | 4.12 |
| Caucasian Female | 295 | 0.26 | 1 | 0.27 |
| Other Certified MWBE | 60 | 0.05 | 4 | 1.10 |
| Total MWBE | 1,255 | 1.10 | 20 | 5.49 |
| D&B MWBE | 3,247 | 2.84 | 49 | 13.46 |
| SBE | 384 | 0.34 | 2 | 0.55 |
| Grand Total | 114,492 | 100.00 | 364 | 100.00 |

Source: San Francisco City and County Building Permits 2010-2015, M³ Consulting, Inc.

Note: M³ Consulting, Inc. defined Commercial Building permits as permits without residential within project description

Based on data reflected in Table 10.18, of a total of \$10.7 billion in private sector construction permits, about half a percent of these dollars were on projects being constructed by 1,255 MWBE firms valued at \$53.3 million; 0.02 percent (\$2.6 million) to 60 African American-owned firms, the lowest among the MWBE group of firms. Permits were given to 118 Hispanic American-owned firms valued at \$8.89 million (0.08 percent), 315 Asian American-owned firms received permits valued at \$5.84 million (0.05 percent); permits valued at \$13.39 million went to Other MBEs and those valued at \$20.03 million (0.19 percent) was given to Caucasian Female-owned firms. D&B MWBEs and non-minority SBEs received \$161.5 million (1.51 percent) and \$7.87 million (0.07 percent), respectively.

In contrast, public sector permits note much smaller amounts awarded to MWBEs overall at only \$6.92 million (as opposed to \$53.3 million in private sector), accounting for only 1 percent of the overall building permits awarded for public sector projects. It is important to note that Hispanic American-owned firms received no dollars from the public sector in building permits; Only two African American-owned firms received a mere \$47,000 (0.01 percent), as did one Caucasian Female-owned firm that received a \$50,000 (0.01 percent) permit; twelve Asian American-owned firms received \$2 million (0.3 percent) in building permits for

construction projects in the public sector, while Other certified MWBEs received over \$4.7 million in permits a (0.68 percent). D&B MWBEs and SBEs received building permits valued at \$2.7 million (0.39 percent) and \$340,893 respectively on public sector projects in the San Francisco-Oakland-Fremont MSA for the five-year period.

| Table 10.18. | | | | |
|--|-----------------------|----------|----------------------|----------|
| Contractor Data | | | | |
| Valuation (\$) of Commercial Building Permits | | | | |
| City and County of San Francisco | | | | |
| San Francisco-Oakland-Fremont CA MSA | | | | |
| FY 2010 – FY 2015 | | | | |
| | Private Sector | | Public Sector | |
| | # | % | # | % |
| Non-S/M/W/DBE | 10,497,264,481 | 97.92 | 684,927,355 | 98.56 |
| African American | 2,668,559 | 0.02 | 47,000 | 0.01 |
| Asian American | 5,839,507 | 0.05 | 2,080,076 | 0.30 |
| Hispanic American | 8,899,892 | 0.08 | - | 0.00 |
| Other MBE | 13,389,021 | 0.12 | 1 | 0.00 |
| Total MBE | 30,796,978 | 0.29 | 2,127,077 | 0.31 |
| Caucasian Female | 20,300,191 | 0.19 | 50,000 | 0.01 |
| Other Certified MWBE | 2,223,230 | 0.02 | 4,741,000 | 0.68 |
| Total MWBE | 53,320,399 | 0.50 | 6,918,077 | 1.00 |
| D&B MWBE | 161,534,936 | 1.51 | 2,737,119 | 0.39 |
| SBE | 7,877,911 | 0.07 | 340,893 | 0.05 |
| Grand Total | 10,719,997,727 | 100.00 | 694,923,444 | 100.00 |

Source: San Francisco City and County Building Permits 2010-2015, M³ Consulting, Inc.

Note: M³ Consulting, Inc. defined Commercial Building permits as permits without residential within project description

10.5.2 DISCRETE COUNT AND VALUE OF BUILDING PERMITS IN PUBLIC AND PRIVATE SECTOR

The 114,492 private sector building permits were obtained by a total of 7,249 contractors in the San Francisco-Oakland-Fremont MSA, whereas a total of only 30 contractors obtained 364 permits from the public sector (see Table 10.21). In the private sector, over 95.6 percent (6,931) of the contractors were Non-S/M/W/DBEs. A total of 76 MBEs, 21 Caucasian Female-owned firms, six Other certified MWBEs, 192 D&B MWBEs and 23 non-minority SBEs obtained permits from the private sector. In contrast, of the 30 firms in the public sector, 23 permits were received by Non-S/M/W/DBEs, one Asian American, one Caucasian Female-owned firms, four D&B MWBEs and one non-minority SBE.

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Table 10.19.
Count of Discrete Contractors
City and County of San Francisco
San Francisco-Oakland-Fremont CA MSA
FY 2010 – FY 2015

| | Private Sector | | Public Sector | |
|-----------------------------|----------------|--------|---------------|--------|
| | # | % | # | % |
| Non-S/M/W/DBE | 6,931 | 95.61 | 23 | 76.67 |
| African American | 10 | 0.14 | 0 | 0.00 |
| Asian American | 25 | 0.34 | 1 | 3.33 |
| Hispanic American | 27 | 0.37 | 0 | 0.00 |
| Other MBE | 14 | 0.19 | 0 | 0.00 |
| Total MBE | 76 | 1.05 | 1 | 3.33 |
| Caucasian Female | 21 | 0.29 | 1 | 3.33 |
| Other Certified MWBE | 6 | 0.08 | 0 | 0.00 |
| Total MWBE | 103 | 1.42 | 2 | 6.67 |
| D&B MWBE | 192 | 2.65 | 4 | 13.33 |
| SBE | 23 | 0.32 | 1 | 3.33 |
| Grand Total | 7,249 | 100.00 | 30 | 100.00 |

Source: San Francisco City and County Building Permits 2010-2015, M³ Consulting, Inc.

Based on the number of building permits received, the top 20 awardees for the period FY 2010-2015 are identified below in Table 10.20. Only two of the BART RWASM firms are among the top 20; they received permits in the private and public sector. While these two firms bid on BART opportunities, they did not win. The top awardee with the highest number of building permits is a D&B MWBE, although participation was only in the private sector. A total of three D&B MWBE firms are among the top 20 awardees who received building permits. Among them, only Pribuss Engineering Inc. received contracts in the public sector as well. None of the three D&B MWBEs were among the RWASM firms within the relevant market for BART.

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Table 10.20.
Count of Discrete Contractors
Top 20 Awardees Based on Count of Building Permits Received
City and County of San Francisco
San Francisco-Oakland-Fremont CA MSA
FY 2010 – FY 2015

| Contractors | Private Sector | | Public Sector | | Total | |
|--|----------------|---------------|---------------|---------------|---------------|---------------|
| | # | % | # | % | # | % |
| Tom Lee Roofing Inc. | 801 | 0.88 | 0 | 0.00 | 801 | 0.88 |
| Siemens Industry, Inc. | 727 | 0.80 | 5 | 1.66 | 732 | 0.80 |
| Ayoob & Peery Plumbing | 711 | 0.78 | 3 | 1.00 | 714 | 0.78 |
| THD At-Home Services Inc./Home Depot | 696 | 0.77 | 0 | 0.00 | 696 | 0.76 |
| Hathaway Dinwiddie Construction Co. | 623 | 0.69 | 3 | 1.00 | 626 | 0.69 |
| RLH Fire Protection / CMA Fire Protect | 597 | 0.66 | 3 | 1.00 | 600 | 0.66 |
| 21st Century Home Improvt | 594 | 0.65 | 0 | 0.00 | 594 | 0.65 |
| Skyline Construction | 569 | 0.63 | 0 | 0.00 | 569 | 0.62 |
| GCI, Inc. | 567 | 0.62 | 0 | 0.00 | 567 | 0.62 |
| BCCI Construction Company | 564 | 0.62 | 0 | 0.00 | 564 | 0.62 |
| Red Hawk Fire & Security Ca LLC | 546 | 0.60 | 1 | 0.33 | 547 | 0.60 |
| A B C Window Contractors | 546 | 0.60 | 0 | 0.00 | 546 | 0.60 |
| Novo Construction Inc. | 540 | 0.59 | 0 | 0.00 | 540 | 0.59 |
| S F Garage Company Inc. | 492 | 0.54 | 0 | 0.00 | 492 | 0.54 |
| Golden Gate Fire Protection Inc. | 469 | 0.52 | 0 | 0.00 | 469 | 0.51 |
| Anderson Rowe & Buckley, Inc. | 467 | 0.51 | 1 | 0.33 | 468 | 0.51 |
| Excelsior Roofing Company | 451 | 0.50 | 0 | 0.00 | 451 | 0.49 |
| Armstrong Installation Service Inc. | 410 | 0.45 | 0 | 0.00 | 410 | 0.45 |
| Jemico LLC DbA Renewal by Anderson of SF | 410 | 0.45 | 0 | 0.00 | 410 | 0.45 |
| Pribuss Engineering Inc. | 401 | 0.44 | 5 | 1.66 | 406 | 0.45 |
| Total | 90,882 | 100.00 | 301 | 100.00 | 91,183 | 100.00 |

Source: Source: San Francisco City and County Building Permits 2010-2015, M³ Consulting, Inc.
 Contractors highlighted in blue are also represented in BART's RWASM pool of firms.

10.5.3 BUILDING PERMITS IN PUBLIC AND PRIVATE SECTOR BY THRESHOLD

Threshold calculations provide insight into whether minority and women-owned firms are receiving building permits in threshold categories where capacity should not be an issue. Looking at thresholds from \$0-\$50,000 to \$10 million and over, Tables 10.23 and 10.24 present count and dollars of discrete contractors.

Non-S/M/W/DBEs received 95.73 percent of all building permits. Even in the category of \$0-\$50,000, Non-S/M/W/DBEs received 95.69 percent of all building permits, valued at \$1.04 billion of a total of \$1.08 billion. In the threshold categories, above \$3 million, non-S/M/W/DBEs received all but five building permits.

Asian American-owned firms reflected the highest number of building permits among minority groups. However, of the 315 building permits, 290 were in the threshold category of \$0-\$50,000, valued at \$2.7 million. Asian American-owned firms received no building permits above \$500,000.

Similarly, no African American firm received permits over \$500,000. These permits account for less than .05 percent of building permit counts and about \$2.7 million in dollars (Table 10.24). African-American-owned firms received a little over \$500,000 in the threshold category of \$0-\$50,000.

Three Hispanic American-owned firms received permits over \$500,000, but only one over \$1.5 million. In the category of \$0-\$50,000, Hispanic American-owned firms received 96 building permits, but these 96 permits were valued at about \$1 million of \$1 billion for this threshold category.

Caucasian Female-owned business followed Asian American-owned firms, with 295 building permits. Like Asian American-owned firms, most of these building permits fell into the threshold category of \$0-\$50,000 at 244 and were valued at about \$3 million. Two Caucasian Female-owned firms received permits valued over \$1.5 million and one over \$3 million.

No MBE firm received any permits over \$3 million and no MWBE over \$5 million, whereas 68 Non-S/M/W/DBEs received permits in the \$5-10 million and 90 in the \$10 million and over range.

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Table 10.21.
Count of Discrete Contractors by Threshold (Part 1)
Public and Private Sector
City and County of San Francisco
San Francisco-Oakland-Fremont CA MSA
FY 2010 – FY 2015

| | 0-50K | | 50-100K | | 100-500K | | 500K-1.5M | | 1.5-3M | |
|-----------------------------|--------|--------|---------|--------|----------|--------|-----------|--------|--------|--------|
| | # | % | # | % | # | % | # | % | # | % |
| Non-S/M/W/DBE | 92,052 | 95.69 | 7,394 | 95.20 | 7,811 | 96.14 | 1,703 | 97.82 | 388 | 97.98 |
| African American | 48 | 0.05 | 4 | 0.05 | 8 | 0.10 | 0 | 0.00 | 0 | 0.00 |
| Asian American | 290 | 0.30 | 13 | 0.17 | 12 | 0.15 | 0 | 0.00 | 0 | 0.00 |
| Hispanic American | 96 | 0.10 | 8 | 0.10 | 10 | 0.12 | 3 | 0.17 | 1 | 0.25 |
| Other MBE | 342 | 0.36 | 48 | 0.62 | 16 | 0.20 | 1 | 0.06 | 0 | 0.00 |
| Total MBE | 776 | 0.81 | 73 | 0.94 | 46 | 0.57 | 4 | 0.23 | 1 | 0.25 |
| Caucasian Female | 244 | 0.25 | 23 | 0.30 | 22 | 0.27 | 3 | 0.17 | 2 | 0.51 |
| Other Certified MWBE | 55 | 0.06 | 1 | 0.01 | 3 | 0.04 | 1 | 0.06 | 0 | 0.00 |
| Total MWBE | 1,075 | 1.12 | 97 | 1.25 | 71 | 0.88 | 8 | 0.46 | 3 | 0.76 |
| D&B MWBE | 2,727 | 2.84 | 254 | 3.27 | 228 | 2.80 | 30 | 1.73 | 5 | 1.26 |
| SBE | 347 | 0.36 | 22 | 0.28 | 15 | 0.18 | 0 | 0.00 | 0 | 0.00 |
| Grand Total | 96,201 | 100.00 | 7,767 | 100.00 | 8,125 | 100.00 | 1,741 | 100.00 | 396 | 100.00 |

Source: San Francisco City and County Building Permits 2010-2015, M³ Consulting, Inc.

Note: M³ Consulting, Inc. defined Commercial Building permits as permits without residential within project description

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Table 10.21 cont.
Count of Discrete Contractors by Threshold (Part 2)
Public and Private Sector
City and County of San Francisco
San Francisco-Oakland-Fremont CA MSA
FY 2010 – FY 2015

| | 3-5M | | 5-10M | | 10M+ | | Total | |
|----------------------|------|--------|-------|--------|------|--------|---------|--------|
| | # | % | # | % | # | % | # | % |
| Non-S/M/W/DBE | 100 | 99.01 | 68 | 97.14 | 90 | 98.90 | 109,606 | 95.73 |
| African American | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 60 | 0.05 |
| Asian American | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 315 | 0.28 |
| Hispanic American | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 118 | 0.10 |
| Other MBE | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 407 | 0.36 |
| Total MBE | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 900 | 0.79 |
| Caucasian Female | 1 | 0.99 | 0 | 0.00 | 0 | 0.00 | 295 | 0.26 |
| MWBE | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 60 | 0.05 |
| Total MWBE | 1 | 0.99 | 0 | 0.00 | 0 | 0.00 | 1,255 | 1.10 |
| D&B MWBE | 0 | 0.00 | 2 | 2.86 | 1 | 1.10 | 3,247 | 2.83 |
| SBE | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 383 | 0.33 |
| Grand Total | 101 | 100.00 | 70 | 100.00 | 91 | 100.00 | 114,492 | 100.00 |

Source: San Francisco City and County Building Permits 2010-2015, M³ Consulting, Inc.

Note: M³ Consulting, Inc. defined Commercial Building permits as permits without residential within project description

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Analysis of Private Sector Disparities

Table 10.22.
Contractor Data by Threshold (Part 1)
Valuation (\$) of Commercial Building Permits
City and County of San Francisco
San Francisco-Oakland-Fremont CA MSA
FY 2010 – FY 2015

| | 0-50K | | 50-100K | | 100-500K | | 500K-1.5M | | 1.5-3M | |
|----------------------|---------------|--------|-------------|--------|---------------|--------|---------------|--------|-------------|--------|
| | \$ | % | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-S/M/W/DBE | 1,040,600,519 | 95.6 | 550,880,296 | 95.20 | 1,760,557,114 | 96.14 | 1,457,530,688 | 97.82 | 819,818,777 | 97.98 |
| African American | 598,059 | 0.05 | 255,500 | 0.05 | 1,815,000 | 0.10 | 0 | 0.00 | 0 | 0.00 |
| Asian American | 2,669,943 | 0.30 | 922,164 | 0.17 | 2,247,400 | 0.15 | 0 | 0.00 | 0 | 0.00 |
| Hispanic American | 1,028,566 | 0.10 | 606,134 | 0.10 | 1,832,360 | 0.12 | 2,432,832 | 0.17 | 3,000,000 | 0.25 |
| Other MBE | 5,116,494 | 0.36 | 3,830,969 | 0.62 | 3,391,558 | 0.20 | 1,050,000 | 0.06 | 0 | 0.00 |
| Total MBE | 9,413,062 | 0.81 | 5,614,767 | 0.94 | 9,286,318 | 0.57 | 3,482,832 | 0.23 | 3,000,000 | 0.25 |
| Caucasian Female | 3,080,663 | 0.25 | 1,583,180 | 0.30 | 4,716,348 | 0.27 | 2,545,000 | 0.17 | 4,875,000 | 0.51 |
| Other Certified MWBE | 774,265 | 0.06 | 61,965 | 0.01 | 687,000 | 0.04 | 700,000 | 0.06 | 0 | 0.00 |
| Total MWBE | 13,267,990 | 1.12 | 7,259,912 | 1.25 | 14,689,666 | 0.88 | 6,727,832 | 0.46 | 7,875,000 | 0.76 |
| D&B MWBE | 32,352,899 | 2.84 | 18,740,020 | 3.27 | 50,578,801 | 2.80 | 23,703,430 | 1.73 | 0 | 0.00 |
| SBE | 2,589,940 | 0.36 | 1,571,028 | 0.28 | 3,716,943 | 0.18 | 0 | 0.00 | 0 | 0.00 |
| Grand Total | 1,088,811,348 | 100.00 | 578,451,256 | 100.00 | 1,829,542,524 | 100.00 | 1,487,961,950 | 100.00 | 837,597,077 | 100.00 |

Source: San Francisco City and County Building Permits 2010-2015, M³ Consulting, Inc.

Note: M³ Consulting, Inc. defined Commercial Building permits as permits without residential within project description

Chapter X

Analysis of Private Sector Disparities

Table 10.22 cont.
 Contractor Data by Threshold (Part 2)
 Valuation (\$) of Commercial Building Permits
 City and County of San Francisco
 San Francisco-Oakland-Fremont CA MSA
 FY 2010 – FY 2015

| | 3-5M | | 5-10M | | 10M+ | | Total | |
|----------------------|-------------|--------|-------------|--------|---------------|--------|----------------|--------|
| | \$ | % | \$ | % | \$ | % | \$ | % |
| Non-S/M/W/DBE | 379,190,418 | 99.01 | 471,093,213 | 97.14 | 4,017,593,456 | 98.90 | 10,497,264,481 | 95.73 |
| African American | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 2,668,559 | 0.05 |
| Asian American | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 5,839,507 | 0.28 |
| Hispanic American | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 8,899,892 | 0.10 |
| Other MBE | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 13,389,021 | 0.36 |
| Total MBE | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 30,796,979 | 0.79 |
| Caucasian Female | 3,500,000 | 0.99 | 0 | 0.00 | 0 | 0.00 | 20,300,191 | 0.26 |
| Other Certified MWBE | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 2,223,230 | 0.05 |
| Total MWBE | 3,500,000 | 0.99 | 0 | 0.00 | 0 | 0.00 | 53,320,400 | 1.10 |
| D&B MWBE | 0 | 0.00 | 16,124,000 | 2.86 | 10,132,487 | 1.10 | 161,534,936 | 2.83 |
| SBE | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 7,877,911 | 0.33 |
| Grand Total | 382,690,418 | 100.00 | 487,217,213 | 100.00 | 4,027,725,943 | 100.00 | 10,719,997,727 | 100.00 |

Source: San Francisco City and County Building Permits 2010-2015, M³ Consulting, Inc.

Note: M³ Consulting, Inc. defined Commercial Building permits as permits without residential within project description

10.6 CONCLUSIONS

This chapter examined various activities in order to determine DBE and MWBE participation levels in private sector and other public sector opportunities. Demographic and Labor Force data, Reed Construction data and City and County of San Francisco Building Permits data was reviewed.

10.6.1 DEMOGRAPHIC AND LABOR FORCE

The local demographics in the San Francisco-Oakland-Fremont MSA includes about 42 percent Whites, a little over 21 percent Hispanic/Latino Americans and Asian Americans each, less than 8 percent African Americans. Of those persons who are in the labor force, Hispanic Americans in the San Francisco-Oakland-Fremont MSA were represented to a greater degree, with 63.7 percent of the total Hispanic population participating in the labor force, compared to 62 percent of the White population. Asian Americans had the lowest level of participation in the labor force at 49.8 percent of the Asian American population, followed by African Americans at 53.2 percent.

It is expected that the differences in the availability of firms in the relevant market would be representative of these statistics. As such, it is important to study the degree to which the population is gaining education and experience that could lead to business formation. Looking into the EEO apprenticeable occupations in the various fields of Construction, Professional Services and Support Services provides insight into significant experience gained by the various race, ethnic or gender groups that is essential for entrepreneurship decisions in the area.

A. Construction

Employment in select apprenticeable EEO Construction occupations in 2010 for the San Francisco-Oakland-Fremont MSA, appears to favor men, who dominate across all occupations with over 82 percent. Furthermore, among all racial and ethnic groups, Hispanic American males have the greatest presence in construction. Asian Americans have some representation in all areas of construction, whereas African Americans have a relatively small presence in construction operations, with the highest presence in Transportation and Material Moving Operations (at 13.9 percent) and lowest as Productive Operatives at 4.5 percent.

B. Professional Services

Asian Americans largely represent the minority presence in the San Francisco-Oakland-Fremont MSA, as well as the State professional occupations. Hispanic Americans are slightly higher in professional service occupations, compared to African Americans in the San Francisco-Oakland-Fremont MSA. African Americans represent about 3 to 5.8 percent of most professional service jobs in the San Francisco-Oakland-Fremont MSA and about 3 to 6.3 percent in the State.

C. Support Services

In Support Service occupations, Asian Americans again lead minorities in the San Francisco-Oakland-Fremont MSA, followed by Hispanic Americans are a close second. African Americans are highest in Protective Service occupations (19.4 percent) and lowest in Sales (6.5 percent).

10.6.2 REED CONSTRUCTION DATA

Further evidence of DBE and MWBE participation and penetration within the construction marketplace was obtained from the Reed bid and award data that surveys construction-related activity for the selected San Francisco-Oakland-Fremont MSA and the San Jose-San Francisco-Oakland CSA regions. The data from Reed Construction indicates that DBEs and MWBEs within the San Francisco-Oakland-Fremont MSA appear to obtain few construction sector projects, even in subcontracting opportunities based on bid counts. Compared to BART, Reed indicates great opportunities in the public sector for Asian American owned firms and to some extent for Hispanic American-owned firms. African American-owned firms and Caucasian American-owned firms however appear to have low participation values in construction overall in the public sector.

Of a total of 298 architectural and 115 engineering firms, DBE and MWBE firms represented 6.65 percent and 12.08 percent respectively. Except for Asian Americans who represented 5.37 percent of Engineers, all other DBE and MWBE groups, African American, Hispanic American, Caucasian Female-owned firms represented between 0.83 percent to 2.01 percent of Architects and Engineers in the MSA. In Construction Management, for the 2012-15 period, construction management firms include only one Hispanic American-owned firm, four Asian American-owned firm and 3 African American-owned firm, two Other MBEs and three Caucasian Female-owned firms in the San Francisco-Oakland-Fremont MSA representing about 17 percent of the firms in the area. In addition, there were four D&B MWBE firms and four SBEs who were available as Construction Management firms. More broadly in General Contracting, 121 MWBEs firms represented only 8.37 percent of all available firms reported in the San Francisco-Oakland-Fremont MSA. No single MWBE group represented over 3 percent of the general contractors.

Of the 1,537 subcontracting firms in the San Francisco-Oakland-Fremont MSA, only 82 (5.34 percent) are DBE or MWBE subcontractors. No single MWBE group represented more than 1.5 percent of subcontractors.

Reed Construction data also lends to analysis on the ranking of bidders that reflects the decision rates of owners in determining the winning bidder (awardee). In the public sector, within the San Francisco-Oakland-Fremont MSA, there are close to 10 percent of MBEs that are ranked #1 in the bidding process by the various public agencies reporting data to Reed Construction. The lower rankings of #2 and #3 does not appear to reflect any difference in pattern. Private sector data was not reported, due to low availability of this self-reported data.

10.6.3 CITY AND COUNTY OF SAN FRANCISCO BUILDING PERMITS DATA

Further potential activity in construction is evident in building permits obtained by firm owners. Over 95 percent of building permits went to Non-S/M/W/DBEs, compared to 80 percent in the public sector. Based on actual dollar values of these building permits, almost 98 percent went to Non-S/M/W/DBEs in both the Private and Public sector.

Conversely, less than 1.1 percent of the total permits in the private sector and 5.49 percent of the permits in the public sector were issued to DBEs or MWBEs. In dollar values, these private sector permits were worth \$53 million that represented 0.5 percent of all private sector permits and \$6.9 million in public sector permits issued to MWBEs represented 1 percent of the total public sector permits. Despite earlier evidence from EEO that Hispanic American males dominated the construction industry occupations, in the public sector, NO permit was issued to any Hispanic American-owned firm and only 0.01 percent and 0.3 percent of issued permits were awarded to African American-owned firms and Asian American-owned firms respectively. Caucasian Female-owned firms were issued 0.01 percent of public sector building permits.

Of the top 20 awardees of building permits for the FY 2010-15, a total of three D&B MWBE firms are among the top 20 awardees that received building permits. None of the three were among the RWASM firms within the relevant market for BART.

CHAPTER 11: RACE NEUTRAL ANALYSIS

11.1 INTRODUCTION

As discussed in Chapter 2: Legal Analysis, as part of narrow tailoring, public entities are required to consider the efficacy of race neutral measures in addressing any disparity or discrimination. The race neutral analysis seeks to determine the ability of existing race neutral efforts in eliminating disparity in the marketplace.

Federal case law has provided some illumination on the question of what constitutes adequate consideration of race-neutral measures.

- 1) A governmental entity does not have to enact race-neutral means, if those means are not feasible or conducive to remedying past discrimination.³⁶⁹
- 2) If race-neutral programs and legislation were in place prior to the establishment of a race-conscious program and had been attempted in good faith, and yet MWBE participation in public procurement remains low relative to availability, then an inference is created that race-neutral programs were inadequate to relieve the impact of past discrimination.³⁷⁰

The Ninth Circuit's view is in line with the standards stated above. According to the court, the narrow tailoring standard only requires "serious, good faith consideration of workable race-neutral alternatives [.]"³⁷¹

Public entities in California must also address the requirements of Proposition 209. This law, enacted in November 1996, forbids preferential treatment in public employment, education, and contracting on the basis of race and gender. Proposition 209, however, does not supersede the 14th Amendment and Federal laws governing race and gender-conscious initiatives. When Federal monies are not involved, public entities in California have relied on race- and gender-neutral measures as a means to increase government contracting opportunities for minority- and women-owned business enterprises (MWBEs). These measures primarily include inclusive programs that provide technical and financial assistance to MWBEs to help establish and grow businesses, as well as improve eligibility and likelihood of obtaining government contracts.

Several city, state, and local organizations were identified that provide technical and

³⁶⁹ *Coral Construction v. King County*, 941 F.2d 910, 923 (9th Cir. 1991), *AGC of California v. Coalition of Economic Equity*, 950 F. 2d 1401,1417 (9th Cir. 1991), *Engineering Contractors v. Dade County*, 122 F. 3d 895 (11th Cir. 1997), *Concrete Works of Colorado, Inc. v. City and County of Denver (Concrete Works I)*, 823 F. Supp. 821 (D Colo 1993), *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005).

³⁷⁰ *Concrete Works I* at 841.

³⁷¹ *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

financial assistance to small, minority and woman-owned business enterprises in the Bay Area. A discussion is also provided of public entities that operate race- and gender-conscious and race- and gender-neutral programs. The inclusion of the results of race- and gender-conscious initiatives further reflects the effectiveness of all remedial-type activity in addressing disparity within the Region.

These programmatic initiatives have been in place during the operation of BART's race- and gender-conscious DBE program, as well as BART's own race- and gender-neutral programmatic initiatives, as discussed in Chapter 3. Based on interviews with OCR, BART engages and interacts with many of the organizations discussed below.

11.2 METHODOLOGY

This chapter's race-neutral analysis is based on a review of over 100 organizations within the primary counties covered by BART (Alameda, Contra Costa, and San Francisco) that provide services to small-, minority- and woman-owned businesses. Of the over 100 organizations, 50 of the most significant organizations were selected for additional research. M³ Consulting representatives contacted these 50 organizations to obtain interviews with the Executive Directors and to obtain more detailed written information regarding program operations and outcomes. Based on response, M³ Consulting representatives conducted face-to-face interviews with 18 directors and program managers in Alameda, Contra Costa, and San Francisco counties to determine the impact race neutral programs have had on S/M/W/DBEs in the Bay Area.

The balance of this chapter is divided into the sections provided as follows:

- 11.3 Small Business Programs
- 11.4 Management & Technical Assistance Programs
- 11.5 Financial Assistance Programs
- 11.6 Outreach, Matchmaking and Networking Programs
- 11.7 Economic and Redevelopment Programs
- 11.8 Anecdotal Comments from Agency Directors
- 11.9 Conclusions

11.3 SMALL BUSINESS PROGRAMS

11.3.1 CITY OF OAKLAND CONTRACT AND COMPLIANCE DIVISION

The main goal of the City of Oakland Department of Contract and Compliance is to enforce City Council policies that stimulate the fair and equitable involvement of Oakland residents and businesses in City contracts and development opportunities. The Department assists small businesses through advocacy; certification process assistance; bidding, noticing, and contract administration; enforcement of prompt payment policies; and navigation through the City's bureaucracy.

The City also maintains a Local and Small Local Business Enterprise (L/SLBE) Program. The objective of the program is to stimulate economic development through the support and empowerment of the local community, especially those L/SLBEs that have been displaced in the past. In November of 2011, the City Council modified Ordinance No. 12389 C.M.S in order to narrowly tailor the mandate that governs participation of L/SLBEs in City contracting. Under the modified ordinance, all City contracts awarded must have 50 percent local business participation: 25 percent maximum local business and 25 percent minimum small local business. The modifications also added additional incentives to stimulate and increase the number of Oakland-certified businesses participating in City contracting.

In addition, the City of Oakland is a recipient of Federal Highway Administration (FHWA) funds. As a condition of receiving those funds, the City implemented the California Department of Transportation Disadvantage Business Enterprise (DBE) Program. It is the policy of the City of Oakland to ensure that DBEs have an equal opportunity to receive and participate in DOT-assisted contracts. Each year, a "Plan" is submitted to Caltrans, listing the measures the City will take to assist Caltrans in achieving its overall statewide goal. The following is data collected through self-reporting by firms to the agency, tracking the ethnic and gender breakdown of contract awards over the past year:

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Table 11.1.
LBE/SLBE Participation on Construction Projects for FY 2012-2013 and FY 2013-2014

| L/SLBE/VSLBE/LPG | \$ | %L/SL/VSL/LPG | % of Total Projects | % of Goal | Program Requirements and Goal Attainment |
|-------------------------------|----------------|---------------|---------------------|-----------|--|
| LBE | 102,161,571.00 | 62.67 | 37.47 | 37.47 | |
| SLBE | 48,143,991.00 | 29.53 | 17.66 | 17.66 | |
| VSLBE | 10,580,239.00 | 6.49 | 3.88 | 7.76 | double counted per program |
| LPG | 2,130,000.00 | 1.31 | 0.78 | 1.56 | double counted per program |
| TOTAL L/SLBE/VSLBE/LPG | 163,015,801.00 | 100.00 | 59.79 | 64.45 | GOAL ACHIEVED FOR PERIOD |
| All Other Businesses | 109,643,670.00 | N/A | 40.21 | | |
| TOTAL ALL PROJECTS | 272,659,471.00 | | 100.00 | | |

Source: Local Business Compliance Report, City of Oakland Contract Compliance Office

Table 11.2.
MBE/WBE Participation on Construction Projects for FY 2012-2013 and FY 2013-2014

| MBE/WBE | \$ | % MBE/WBE | % of Total Projects |
|----------------------|---------------|-----------|---------------------|
| MBE | 32,721,355.00 | 76.49 | 12.00 |
| WBE | 10,058,424.00 | 23.51 | 3.69 |
| TOTAL MBE/WBE | 42,779,779.00 | 100.00 | 15.69 |

Source: Local Business Compliance Report, City of Oakland Contract Compliance Office

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Table 11.3.
MBE/WBE Participation on Construction Projects for FY 2012-2013 and FY 2013-2014 By Ethnicity

| ETHNICITY (Self-Reported) | | AMOUNT | % of MBE | % of Total |
|---------------------------|--------|--------------------|---------------|---------------|
| Caucasian/Other/NL | C/O/NL | 229,879,692 | N/A | 84.31 |
| African American | AA | 10,524,270 | 32.16 | 3.86 |
| Hispanic | H | 19,677,859 | 60.14 | 7.22 |
| Asian Pacific | AP | 2,365,226 | 7.23 | 0.87 |
| Asian Indian | AI | 22,000 | 0.07 | 0.01 |
| Native American | NA | 132,000 | 0.40 | 0.05 |
| Subtotal Ethnicity | | 32,721,355 | 100.00 | 12.00 |
| Women | | 10,058,424 | N/A | 3.69 |
| GRAND TOTAL | | 272,659,471 | | 100.00 |

Source: Local Business Compliance Report, City of Oakland Contract Compliance Office

11.3.2 COUNTY OF ALAMEDA – SMALL, LOCAL AND EMERGING BUSINESS (SLEB) PROGRAM

Administered by the County of Alameda Auditor-Controller’s Agency, the Small, Local and Emerging Business (SLEB) program is a race- and gender-neutral program designed to enhance contracting and procurement opportunities for small, local and emerging businesses within Alameda County. The SLEB program was developed to promote and foster inclusiveness, diversity and economic development; and on-going evaluation to ensure all businesses, including SLEBs, are provided equal opportunities in County contracting and procurement activities. The mission of this program is to develop and promote economic growth for the community in which it serves. The County desires to foster the growth of SLEBs. The County ensures that its process is inclusive for all residents regardless of race, color, gender, age, religion, national origin, disability or any other factor that is prohibited when making business decisions. The SLEB program was developed within the parameters of all applicable local and state laws including Proposition 209. The program is comprehensive, Countywide and applies to the procurement of over one hundred million dollars in County goods and services annually. The County's program(s) for construction contracts is governed by Public Contract Code 2000 - 2002.

An SLEB is a local business that is certified as either small or emerging:

- Local Business: A business having a fixed office with a street address in Alameda County, and having a valid business license issued by the County or a city within Alameda County;

- Small Business: A business which has been certified by the County as local and meets the U.S. Small Business Administration (“SBA”) size standards for its classification; and,
- Emerging Business: A business which has been certified by the County as local and meets less than one half the SBA size standard for its classification and has been in business less than 5 years.

The Small, Local and Emerging Business (SLEB) program is designed to enhance contracting and procurement opportunities for small, local and emerging businesses within Alameda County, by providing up to 10 percent bid preferences on eligible contracts. The maximum bid evaluation preference points for being certified are five percent local and five percent certified small or emerging business. Compliance with the SLEB program is required for architectural, landscape architectural, engineering, environmental, land surveying, and construction project management services projects.

11.3.4 CITY OF SAN FRANCISCO

A. San Francisco Office of Small Business, Small Business Assistance Center

The Office of Small Business was created by a ballot measure by voters in 2007 and doors opened in May 2008. The Small Business Development center funded by SBA is housed inside the Office of Small Business serving the same population, small businesses. The primary function of the Office of Small business is:

- To advise small businesses on licenses and permits to open business(s) in the City of San Francisco; and,
- To connect with resources the City has to offer (certifications, LBE opportunities, Green business program, etc.).

1. Technical Assistance

The Office of Small Business partners with the Invest in Neighborhood Program in the Office of Economic and Workforce Development to assist businesses with funding for community block grant dollars.

- SBDC has a team of consultants that provide businesses with technical assistance to help businesses build capacity through:
 - Assistance on bids;
 - Support with estimating, financing, and operations; and,

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- Marketing to better promote business.

2. Funding/Financial Assistance

The Office of Small Business provides Financial Assistance via the following programs and actions:

- City-owned and run revolving loan program;
- Assistance for firms that want to build capacity or become loan-ready;
- SBDC assistance with businesses with loan package application; and,
- Identifying access to capital.

Analysis of SBDC data indicates initially many of the businesses that came to SBDC were emerging businesses. Now, the focus is on helping small business owners gain access to capital. About 25 percent of all clients are provided with financial assistance. Last year, \$15 million was awarded to clients, \$6.2 million in loans. Resources for businesses to access capital have become more flexible with the increase in online lenders.

| Gender | 2015 | 2014 | 2013 | 2012 |
|---|-------|-------|-------|-------|
| Women Owned | 30.49 | 31.14 | 32.61 | 39.01 |
| Male Owned | 43.93 | 42.86 | 39.09 | 34.05 |
| Male-Female Owned | 16.39 | 18.32 | 14.04 | 13.22 |
| No Response | 9.18 | 7.69 | 14.25 | 13.72 |
| Race/Ethnicity | | | | |
| Asian | 25.25 | 26.01 | 20.95 | 17.36 |
| Black or African American | 6.56 | 4.03 | 8.21 | 7.11 |
| Native Hawaiian or Other Pacific Islander | 1.97 | 1.10 | 0.86 | 1.16 |
| White | 36.07 | 45.05 | 42.98 | 45.29 |
| Hispanic or Latino | 13.77 | 11.36 | 13.39 | 12.23 |
| American Indian or Alaskan Native | 0.66 | 0.73 | 0.65 | 0.33 |
| No Response | 15.74 | 11.72 | 12.96 | 16.53 |

Source: San Francisco SBDC

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B. CITY AND COUNTY OF SAN FRANCISCO CONTRACT MONITORING DIVISION

San Francisco Contract Monitoring Division oversees local business certification and compliance for businesses in San Francisco. The Division sets Local Business Enterprise (LBE) subcontracting goals, provide pre-bid information and post award monitoring of contracts. In addition, the Contract Monitoring Division monitors San Francisco’s equal benefits program that ensures that employees with domestic partners have equal benefits.

The LBE Contracting Report documents the number of firms that the Contract Monitoring Division has certified and the LBE contract award statistics on contracts for the Airport, Department of Public Works, Port, Public Utilities Commission and the Recreation and Park Department.

| Table 11.5. | | |
|---|----------------|----|
| City and County of San Francisco | | |
| Public Utilities Commission | | |
| FY 14 - FY 15 | | |
| FY 14-15 Awards** | | |
| FY 14-15 Awarded Contracts | | |
| Total Number of Contracts | 45 | |
| | # | % |
| Professional Services | 16 | 36 |
| Construction | 29 | 64 |
| LBE Primes* | 26 | 58 |
| Non-LBE Primes* | 23 | 51 |
| MBE Primes | 8 | 18 |
| OBE Primes | 11 | 24 |
| WBE Primes | 6 | 13 |
| SBA LBE Primes | 1 | 2 |
| Amount Awarded | \$ 216,130,199 | |
| | \$ | % |
| Awarded to Non-LBE Primes | \$ 84,993,670 | 39 |
| Awarded to Non-LBE Subs | \$ 45,757,454 | 21 |
| Awarded to LBE Primes | \$ 44,824,734 | 21 |
| Awarded to LBE Subs | \$ 40,554,341 | 19 |
| Awarded to MBE Primes | \$ 9,226,516 | 4 |
| Awarded to MBE Subs | \$ 20,171,795 | 9 |
| Awarded to OBE Primes | \$ 23,378,626 | 11 |
| Total Number of Contracts | 7 | |
| | # | % |

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| | | |
|---------------------------|--------------|----|
| Professional Services | 4 | 57 |
| Construction | 3 | 43 |
| LBE Primes* | 5 | 71 |
| Non-LBE Primes* | 3 | 43 |
| MBE Primes | 1 | 14 |
| OBE Primes | 4 | 57 |
| WBE Primes | 0 | 0 |
| FY 14-15 Awards** | | |
| Amount Awarded | \$ 8,228,481 | |
| | \$ | % |
| Awarded to Non-LBE Primes | \$ 673,280 | 8 |
| Awarded to Non-LBE Subs | \$ 550,322 | 7 |

Source: City of San Francisco, Small Business Program

Below is a summary of City and County of San Francisco Department of Public Works participation.

| | | |
|--|--------------|----|
| Table 11.6. City and County of San Francisco Department of Public Works Contract Award and Payment Summary FY 14-15 | | |
| FY 14-15 Awarded Contracts | | |
| Total Number of Contracts | 73 | |
| | # | % |
| Professional Services | 16 | 22 |
| Construction | 57 | 78 |
| LBE Primes* | 62 | 85 |
| Non-LBE Primes* | 17 | 23 |
| MBE Primes | 26 | 36 |
| OBE Primes | 24 | 33 |
| WBE Primes | 8 | 11 |
| SBA LBE Primes | 4 | 5 |
| Awarded to LBE Primes | \$ 4,804,990 | 58 |
| Awarded to LBE Subs | \$ 2,199,890 | 27 |
| | \$ | % |
| Awarded to MBE Primes | \$ 264,488 | 3 |
| Awarded to MBE Subs | \$ 912,488 | 11 |
| Awarded to OBE Primes | \$ 4,540,502 | 55 |
| Awarded to OBE Subs | \$ 1,213,538 | 15 |
| Awarded to WBE Primes | \$ - | 0 |
| Awarded to WBE Subs | \$ 73,865 | 1 |

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| | | | |
|---|---|----------------|----|
| Awards to SBA Primes | | \$ - | 0 |
| Awards to SBA Subs | | \$ - | 0 |
| FY 14-15 Micro Set Aside Contracts | | | |
| Total Eligible | 0 | | |
| FY 14-15 Awards** | | | |
| Amount Awarded | | \$ 157,896,962 | |
| | | \$ | % |
| Awarded to Non-LBE Primes | | \$ 24,198,655 | 15 |
| Awarded to Non-LBE Subs | | \$ 8,414,044 | 5 |
| Awarded to LBE Primes | | \$ 84,882,262 | 54 |
| Awarded to LBE Subs | | \$ 40,402,001 | 26 |
| Awarded to MBE Primes | | \$ 30,934,028 | 20 |
| Awarded to MBE Subs | | \$ 25,072,026 | 16 |
| Awarded to OBE Primes | | \$ 31,517,884 | 20 |
| Awarded to OBE Subs | | \$ 11,567,934 | 7 |
| Awarded to WBE Primes | | \$ 12,051,500 | 8 |
| Awarded to WBE Subs | | \$ 3,762,041 | 2 |
| Awarded to SBA Primes | | \$ 10,378,850 | 7 |
| Awarded to SBA Subs | | \$ - | 0 |
| FY 14-15 Micro Set Aside Contracts | | | |
| Total Eligible | | | 6 |
| Total Awarded | | | 7 |

Source: City of San Francisco, Small Business Program

C. SAN FRANCISCO INTERNATIONAL AIRPORT (SFO) – DBE AND SMALL BUSINESS PROGRAM

San Francisco International Airport (SFO) is a department of the City and County of San Francisco that is “a transparent organization dedicated to serving our local community as well as the millions of travelers who pass through our doors each year.” Through the Airport Commission’s Small Business Affairs Office (SBAO), the SFO conducts outreach programs to promote and ensure local, small and disadvantaged business participation in Airport concession leases and contracts (e.g. construction and professional services). SBAO staff serve as an advocate, disseminates information, and develops policies and activities to maximize small business participation in all phases of Airport contracting.

SBAO also enforces the Federal DBE and Airport Concessions DBE (ACDBE) contracting requirements, and monitors the LBE compliance program for SFO.

SFO has received federal financial assistance from the U.S. Department of Transportation, and as a condition of receiving this assistance, SFO has established a DBE Program in accordance with regulations of 49 CFR Part 26 and an ACDBE Program in accordance with regulations of 49 CFR Part 23.

SFO's Federal Fiscal Three-Year DBE and ACBDE Participation Goals are:

- 13 percent DBE Goal for Construction & Professional Services Project:
FFY 2014-2016
- 29 percent ACDBE Goal for Concessions (Retail, Food & Beverage Shops):
FFY 2015- 2017

11.3.5 EAST BAY MUNICIPAL UTILITY DISTRICT (EBMUD)

For more than 30 years, the East Bay Municipal Utility District (EBMUD) has promoted stewardship in contract equity to invest in and support a Contract Equity (CE) Program. “Ensuring diversity in its contracting and supply chain supports our mission to deliver safe, reliable and high quality water and wastewater services for 1.4 million customers.” Through its CE Program, EBMUD provides assistance to all prospective bidders/proposers in obtaining subcontractor participation by all availability groups, including identification of potential local and small business enterprises.

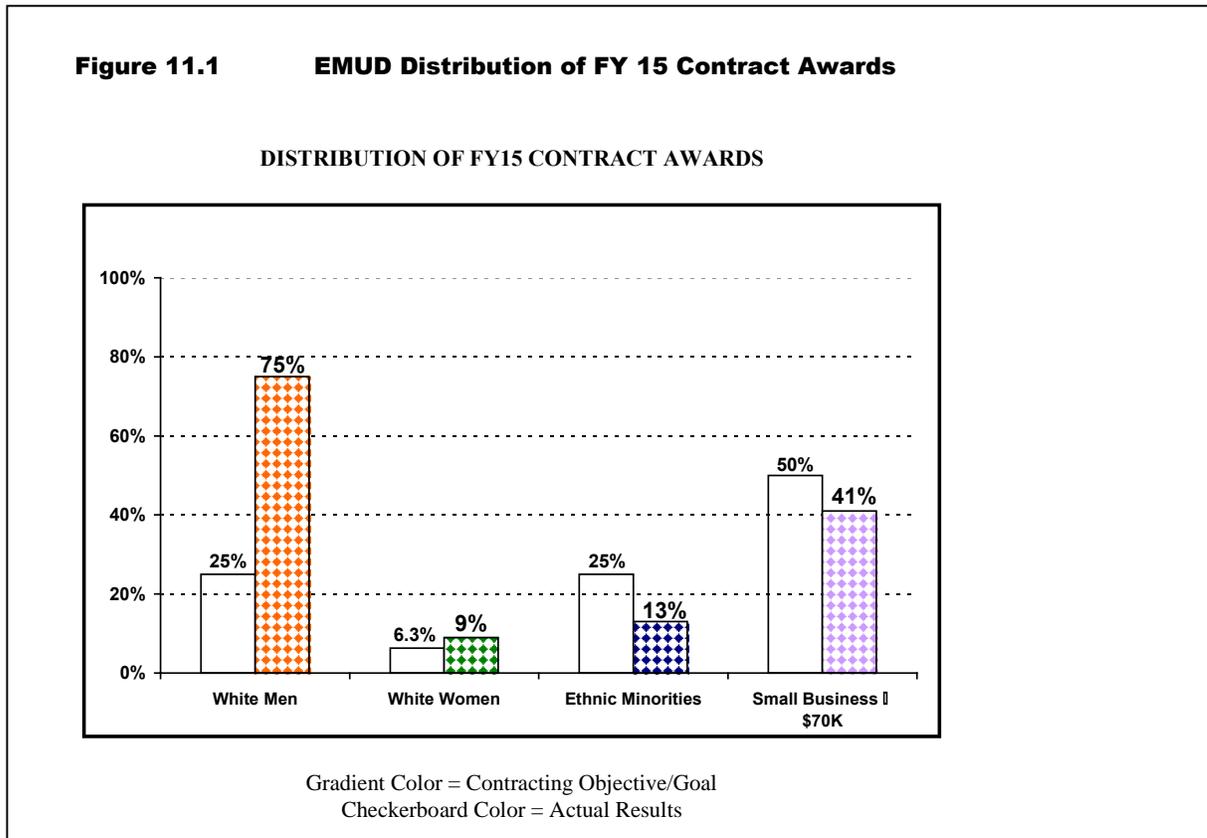
The role of the CE Office is to ensure fairness and equity in contracting opportunities, bidding of potential contracts, and the execution of contracts with the business community, especially those sectors historically underutilized, small and local. The CE Office’s mission is to increase contract participation in:

- Culturally and gender diverse businesses;
- Small businesses³⁷²; and,
- Local businesses.

Throughout the years, the CE Office has expanded the District’s commitment and efforts to include diverse-owned businesses. As a result, since inception of the CE Program, the District has awarded over \$3.6 billion in contracts with 21 percent (\$765 million) going to ethnic

³⁷² “Small business” is a business enterprise that has average annual gross receipts of \$14,000,000 or less over the previous three years or is a manufacturer with 100 or fewer employees.

minority and white women-owned businesses (EM/WWBEs). This represents an average of \$24.7 million in annual awards to EM/WWBE's.



In FY15, the District awarded a total of approximately \$148 million, with exclusions of \$22 million. Excluded contracts are awards to government/non-profit (\$3.3M), publicly held corporations (\$13.4M), foreign owned (\$2.9M) and sole source providers (\$2.5M).

The chart above reflects the program results and levels of participation. The overall contracting objective was achieved and goals exceeded for white men (75 percent) and white women (9 percent), but fell short for ethnic minorities (13 percent). Unclassified firms received 3 percent of contract awards. Small businesses for contract awards ≤ \$70,000 achieved 41 percent of its 50 percent goal. See Figure 11.2 below for the distribution of contract awards – overall and for contract awards ≤ \$70,000.

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Figure 11.2 EBMUD Overall Distribution of Contract Awards

FY15 YEAR-END – OVERALL DISTRIBUTION OF CONTRACT AWARDS
East Bay Municipal Utility District
July 1, 2014 – June 30, 2015

| Contract Category/Awards (\$) | Availability Group/Misc. Grouping | Contracting Objective % | FY14 YEAR-END Results % | FY15 YEAR-END Results % | |
|-------------------------------|-----------------------------------|-------------------------|-------------------------|-------------------------|------|
| Professional Services | \$21.2M* | White Men | 25.0 | 87.5 | 80.2 |
| | | White Women | 6.0 | 2.1 | 13.7 |
| | | Ethnic Minorities | 25.0 | 8.7 | 5.8 |
| | | Unclassified | NA | 1.6 | 0.3 |
| | \$24.6M | Local Business | NA | 62.4 | 32.5 |
| | | Local/Small Business | NA | 13.4 | 6.3 |
| | | Small Business | 50.0 | 29.3 | 19.3 |
| | | Microbusiness | NA | 5.1 | 4.1 |
| General Services | \$7.9M* | White Men | 25.0 | 75.3 | 74.6 |
| | | White Women | 6.0 | 7.7 | 8.8 |
| | | Ethnic Minorities | 25.0 | 10.5 | 11.4 |
| | | Unclassified | NA | 6.3 | 5.2 |
| | \$11.9M | Local Business | NA | 40.5 | 55.3 |
| | | Local/Small Business | NA | 11.8 | 20.6 |
| | | Small Business | 50.0 | 22.2 | 40.4 |
| | | Microbusiness | NA | 4.4 | 5.7 |
| Construction | \$44.4M* | White Men | 25.0 | 90.0 | 73.2 |
| | | White Women | 9.0 | 3.0 | 10.5 |
| | | Ethnic Minorities | 25.0 | 7.2 | 15.9 |
| | | Unclassified | NA | 0.0 | 0.4 |
| | \$42.5M | Local Business | NA | 25.1 | 38.6 |
| | | Local/Small Business | NA | 7.3 | 26.2 |
| | | Small Business | 50.0 | 9.7 | 36.5 |
| | | Microbusiness | NA | 1.2 | 4.8 |
| Materials & Supplies | \$45.6M* | White Men | 25.0 | 68.4 | 76.5 |
| | | White Women | 2.0 | 8.5 | 6.2 |
| | | Ethnic Minorities | 25.0 | 19.1 | 16.1 |
| | | Unclassified | NA | 4.0 | 1.2 |
| | \$56.9M | Local Business | NA | 48.0 | 43.2 |
| | | Local/Small Business | NA | 11.9 | 28.0 |
| | | Small Business | 50.0 | 29.1 | 24.7 |
| | | Microbusiness | NA | 5.1 | 2.9 |
| Purchase Cards | \$8.4M* | White Men | 25.0 | 47.9 | 57.5 |
| | | White Women | 2.0 | 7.1 | 5.8 |
| | | Ethnic Minorities | 25.0 | 9.0 | 6.2 |
| | | Unclassified | NA | 36.0 | 30.4 |
| | \$9.9M | Local Business | NA | 21.3 | 19.4 |
| | | Local/Small Business | NA | 12.0 | 15.7 |
| | | Small Business | 50.0 | 35.3 | 31.7 |
| | | Microbusiness | NA | 3.4 | 1.6 |
| Overall Contracts | \$125.7M* | White Men | 25.0 | 80.0 | 74.6 |
| | | White Women | 6.3 ² | 5.0 | 9.1 |
| | | Ethnic Minorities | 25.0 | 10.8 | 13.3 |
| | | Unclassified | NA | 3.8 | 3.0 |
| | \$147.9M | Local Business | NA | 38.3 | 40.7 |
| | | Local/Small Business | NA | 10.0 | 22.4 |
| | | Small Business | 50.0 | 20.2 | 29.1 |
| | | Microbusiness | NA | 3.4 | 3.9 |

¹ Ethnic Minorities includes Men and Women.

² Weighted average based on contract distribution per contract category for FY99-FY02; for the District overall and departments with construction awards, the contracting objective is 6.3 percent; for departments without construction awards, the objective is 3.5 percent.

Key Components of the Contract Equity Program

- A goal of awarding 50 percent of all annual contract awards of \$70,000 or less to SBEs;
- A set-aside of at least 25 percent of all annual contract awards of \$70,000 or less to SBEs;
- A 5 percent bid discount, not to exceed \$250,000 per year of the annual contract, to responsive/responsible bidders per contract year on materials and supplies contracts, to general services contracts where price is the determining factor, and to the lump sum bid amount on construction contracts; and,
- Acceptance of the California Department of General Services Small and Micro Small Business Certification.

In addition, the CE program publishes Contract Equity guidelines and forms, business vendor Directories, a Contract Equity newsletter and annual report for business owners. It also hosts business forums for business owners to learn how to do business with the East Bay Municipal Utility District, meet EBMUD staff, and network with other business owners.

The Contract Equity (CE) Program enhances equal opportunities for business owners of all races, ethnicities, and all genders interested in doing business with the East Bay Municipal Utility District. The CE Program requires bidders/proposers to conduct outreach to potential subcontractors to ensure that opportunities to participate in District contracts are publicized as widely as possible. This outreach is intended to broaden the pool of competitive bidders, lower prices to the District, and help achieve diversity among District contractors and subcontractors. The District's expectation is that with bidders'/proposers' Good Faith Outreach Efforts to subcontractors of all races and both genders, the composition of District contractors and subcontractors will reflect the broad diversity present in the marketplace, consistent with the Contracting Objectives of the CE Program.

11.3.6 CITY COLLEGE OF SAN FRANCISCO – SLBE/SBE

The City College of San Francisco has established a Small Local Business Enterprise (SLBE) program and a Small Business Enterprise (SBE) program to assist small businesses with construction contract bidding opportunities.

A. Small Local Business Enterprise (SLBE)

City College District staff take affirmative steps to encourage SLBE firms to participate in District construction and construction-related professional services work at both the prime contractor and subcontractor level. Special effort is taken to encourage small, local businesses to participate in educational activities that enhance the ability to perform work. Outreach efforts are targeted to new businesses, as well as existing businesses located in the City and County of San Francisco.

To be eligible for a professional services contract award, each consultant must agree to comply with the requirements of the SLBE Program authorized by the San Francisco Community College District, (SFCCD) Board of Trustees, Resolution No. 010426-P1, where applicable. The consultant is responsible for, and must comply with, all of the details contained in the Resolution and Program Policies, as implemented through these Rules, Regulations and Requirements.

In addition, the District has also established incentives to enhance SLBE participation at the prime contractor level on construction contracts under \$15,000. The District may extend a ten percent (10 percent) discount to an SLBE prime contractor.

B. Small Business Enterprise (SBE)

The City College of San Francisco SBE program is intended to create subcontracting goals and incentives to increase small business participation on District construction contracts. The minimum SBE subcontractor goal is 25 percent. SBE bidders receive a 5 percent bid discount, up to a maximum of \$50,000. The Prime Contractor is responsible for and must comply with all SBE rules, regulations and requirements.

To be eligible for an award of a construction contract, each Prime Contractor must agree to comply with the requirements of the San Francisco Community College District (District) SBE Program. The Prime Contractor is responsible for and must comply with all the details contained in the rules, regulations and requirements.

It is the policy of the San Francisco Community College District to encourage and facilitate full and equitable business opportunities, specifically in the area of construction contracting, for all small businesses wishing to do business with the District.

C. Goals and Incentives

There are two types of sub-consulting goals: (1) overall program goals which represent the percentage of SLBE sub-consulting utilization the District will seek to achieve on an annual basis on construction-related professional service contracts, and (2) construction-related professional service contract specific sub-consulting goals which will be set on a project-by-project basis. The District has also established incentives to enhance SLBE participation at the prime contractor level on construction contracts under \$15,000 and on construction-related contracts under \$500,000. Table 11.5 summarizes the application of the sub-consulting goal and the prime contractor incentive programs:

| Table 11.7. City College of San Francisco Program Types | | |
|--|-------------------------------|---|
| | Type of program | Size of Contracts |
| Construction Prime Contractors | Bid discounts | Contracts below \$15,000 |
| Construction-related Professional Service Prime Contracts | Evaluation credits | Contracts below \$500,000 |
| Construction-related Professional service Subcontracts | Contract subcontracting goals | All contracts with subcontracting opportunities and where SLBEs are available to perform subcontracts |

Source: City College of San Francisco

D. Overall Program Goals and Targets

The District has established an overall program goal to ensure an adequate level of SLBE participation in District construction-related professional service subcontracts. The annual SLBE sub-consultant participation goal will be based on the availability of certified small local businesses for construction-related professional services. The current SLBE sub-consulting for Construction-Related Professional Service is 50 percent.

E. Project Sub-Consultant Goals

The District will set project-specific sub-consultant goals on each construction-related professional service contract, based on the availability of SLBEs to perform the specified work required for the proposed project. The source used by the District to identify firms is the San Francisco Human Rights Commission’s LBE certification list as discussed in section V below. It is the objective of the District that the SLBE goals are met on each construction-related professional service contract awarded. No contract with SLBE goals shall be awarded to any consultant failing to meet these goals unless the consultant has made a good faith effort to meet the goals but was still unable to do so.

11.3.7 OFFICE OF COMMUNITY INVESTMENT AND INFRASTRUCTURE (OCII) (SUCCESSOR AGENCY TO THE SAN FRANCISCO REDEVELOPMENT AGENCY) – (OCII) SBE PROGRAM

The Office of Community Investment and Infrastructure ("OCII") (Successor Agency to the San Francisco Redevelopment Agency ("SFRA")) mission continues to be: “to establish a set of Small Business Enterprise participation goals and good faith efforts designed to ensure

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that monies are spent in a manner which provides SBEs with an opportunity to compete for and participate in Office of Community Investment and Infrastructure (“OCII” or “Agency”) assisted projects.”

OCII has continued to implement the SFRA Purchasing Policy. The Purchasing Policy establishes the policies and standards for the purchase of goods (including catering and printing), materials, products, items, supplies, commodities and equipment and personal and/or professional services.

OCII implements a Small Business Enterprise (SBE) Program with an overall SBE goal of 50 percent on agency assisted contracts. “Small Business Enterprise (SBE)” means an economically disadvantaged business that: is an independent and continuing business for profit; performs a commercially useful function; is owned and controlled by persons residing in the United States or its territories; has average gross annual receipts in the three years immediately preceding its application for certification as an SBE that do not exceed the following limits:

| Table 11.8. | |
|--|----------------------|
| OCII SBE Program Size Limits | |
| Industry | Size Standard |
| Construction Contractors | \$20,000,000 |
| Specialty Construction Contractors | \$14,000,000 |
| Suppliers (goods/materials/equipment and general services) | \$10,000,000 |
| Professional Services | \$ 2,500,000 |
| Trucking | \$ 3,500,000 |

Source: OCII

As of March 30, 2012, the Successor Agency has adopted a new procedure for certifying Small Business Enterprises (SBE), Minority-owned Business Enterprises (MBE) and Women-owned Business Enterprises (WBE). Due to a lack of staff resources, the Successor Agency no longer directly certifies SBE, MBE, and WBE, but instead relies on the information provided in other public entities’ business certifications to establish eligibility for the Agency programs.

Effective July 7, 2015, OCII amended its Small Business Enterprise (SBE) Policy to accept the City and County of San Francisco’s micro and small Local Business Enterprise certifications and added clarifying language to joint ventures and associations. As a result,

OCII now accepts micro and small Local Business Enterprise (LBE) certifications performed by the City and County of San Francisco as being eligible to participate in the Agency's SBE Program.

Since July 1, 1998, firms seeking contracts or purchase orders that exceed \$5,000 have been obligated to comply with the San Francisco Redevelopment Agency's Nondiscrimination in Contracts and Equal Benefits Policy. OCII continues to enforce this policy. The Policy is based upon the City and County of San Francisco's Nondiscrimination in Contracts: Equal Benefits Ordinance.

11.3.8 CALIFORNIA DEPARTMENT OF TRANSPORTATION

The U.S. Department of Transportation's (DOT) Operating Administration distributes substantial funds each year to finance construction projects initiated by state and local governments, public transit and airport agencies. To ensure that firms competing for DOT-assisted contracts for these projects are not disadvantaged by unlawful discrimination, the Department established a Disadvantage Business Enterprise (DBE) program. The program was originally started in 1980 as a minority/women's business enterprise program established by regulations under the authority of the Title VI of the Civil Rights Act of 1964 and other non-discrimination statutes that apply to DOT financial assistance. Over the years, Congress has reauthorized the DBE program. Recipients of DOT funds must develop and implement a DBE program that conforms to DOT standards set forth in 49 CFR 23 (for airport concessions) and 49 CFR Part 26. These sections of the Code of Federal Regulations place primary responsibility for the certification process upon State Transportation Agencies.

The California Department of Transportation (Caltrans), Office of Business & Economic opportunity (OBEO) is responsible for oversight of the Disadvantaged Business Enterprise Program, and Minority/Woman Owned Business Programs for federally-funded projects. There are additional branches within the OBEO whose function is to ensure non-discrimination in the execution of contracts. These organizations play the following role:

- Title VI compliance;
- Contract compliance reviews;
- Investigation into complaints against DBEs/DVBEs;
- Contract evaluation for federal goal participation requirements;
- Outreach and training;
- Contract support services;
- On the job training; and,

- DBE certification

Under its DBE program, Caltrans has established a DBE goal of 12.5 percent on its federal-funded projects. In 2015, Caltrans had awarded 11 percent of federally funded projects to DBEs at the time of this interview. In addition, Caltrans has a 20 percent Small Business Enterprise (SBE) requirement under its state-funded contracts, as Proposition 209 prohibits the agency to provide race- and gender-conscious programs for state-funded contracts. The Caltrans DBE program provides four quarterly workshops to present upcoming projects and to introduce prime contractors to subcontractors. Caltrans also hosts mandatory pre-bid meeting for prime contractors; subcontractors are encouraged to attend and introduce themselves to primes.

Further, the DBE program assists DBEs with the certification process. The Program's rigorous certification process helps ensure that certified DBEs are viable companies. Caltrans has a database of over 5,000 small business firms certified to do work with the agency. The agency utilizes the database for outreach, from which 300 – 500 of those firms have worked on Caltrans' projects.

11.3.9 CALIFORNIA PUBLIC UTILITIES COMMISSION (CPUC) SUPPLIER DIVERSITY PROGRAM

California Public Utilities Commission (CPUC) Supplier Diversity Program is a small business advocacy program that provides information on CPUC contracting opportunities to ensure the agency achieves supplier diversity. In response to Assembly Bill 3678, the Public Utilities Commission issued General Order 156 (GO 156), which outlined program guidelines to promote utility recruitment and use of women and minority-owned business enterprises. GO 156 also required participating utilities to establish a joint clearinghouse.

Procurement goals of 5 percent for women and 15 percent for minorities were initially established, and later augmented with a 1.5 percent goal for disabled veteran enterprises. On June 11, 2015, the CPUC expanded the Supplier Diversity Program to include LGBT-owned businesses.

The Supplier Diversity Program is a voluntary program, which encourages area utility companies that make at least \$25 million dollars to participate in the Supplier Diversity Program and use firms that are listed on the Diverse Suppliers Database of MBEs, WBEs, DVBEs, and recently included LGBTs. The Program also encourages utilities to purchase at least 21.5 percent of procurement from WMDVBEs (15 percent from minority, 5 percent from women, and 1.5 percent from disabled veteran-owned businesses), as well as LGBT-owned businesses in procurement. Participating companies are asked to submit an annual report that identifies monies spent broken down by ethnicity, race, and gender.

| Table 11.9. | |
|---|-------------|
| Voluntary Program Goals | |
| Program | % |
| Women-owned Business Enterprise (WBE) | 5.6 |
| Minority-owned Business Enterprise (MBE) | 15.0 |
| Disabled Veteran-owned Business Enterprise (DVBE) | 1.5 |
| Total | 21.5 |

Source: CPUC

Even though companies are not penalized for not meeting the goals, CPUC raises visibility of the need to do business with WMDVBEs, which creates an effort on the part of companies.

Although the goal is voluntary, larger firms like AT&T are meeting the goal with 40 percent participation, billions of dollars spent with diverse firms. However, smaller utility firms had trouble meeting the goal, only reporting 7-10 percent.

A. Highlights:

- Utility spending on WMDVBE procurement increased from \$8.65B (in 2013) to \$8.67B (in 2014);
- Percentage of total utility procurement from WMDVBE firms decreased from 35.22 percent (in 2013) to 32.86 percent (in 2014);
- Pacific Gas and Electric (PG&E), San Diego Gas and Electric (SDG&E), Southern California Edison (Edison), and Southern California Gas Company (SoCalGas) continue to exceed the program’s 21.5 percent goal. In 2014, these companies attained at least 40 percent procurement from WMDVBE firms;
- In 2014, AT&T California (AT&T), Sprint, Verizon California procured more than \$1.1B (50 percent); Sprint more than \$684M (50.03 percent); and Verizon more than \$484M (49.11 percent) from WMDVBE suppliers; and,
- Overall spend for the small utilities increased from \$170M (17.72 percent) in 2013 to \$202M (21.07 percent) in 2014, registering a 19 percent increase.

The total utility WMDVBE procurement for 2014 increased from \$8.65 billion in 2013 to \$8.67 billion. The results below show the \$8.67 billion category spend for 2014.

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| Category | Procurement Amount | Percentage Achieved | Goal |
|----------|--------------------|---------------------|-------------|
| MBE | \$5.82 billion | 22.07 percent | 15 percent |
| WBE | \$2.47 billion | 9.63 percent | 5 percent |
| DVBE | \$0.38 billion | 1.43 percent | 1.5 percent |

Source: CPUC

For 2014, the utilities met the women-owned business' (WBE) 5 percent and minority-owned business' (MBE) 15 percent program goals and almost met the disabled veteran-owned business' (DVBE) 1.5 percent goal.

Large utilities = utilities with total procurement of approximately \$150M or more (i.e. AT&T, Comcast California, T-Mobile and Metro PCS, PG&E, SDG&E, Sprint, Verizon, etc.):

- Overall decrease in **WMDVBE participation** from \$8.48B/35.93 percent in 2013 to \$8.46B/33.3 percent in 2014;
- 9 of 12 large utilities met **MBE requirement** of 15 percent; 3 did not meet requirement;
- Procurement dollars with **MBE** decreased from \$5.89B (24.96 percent) in 2013 to \$5.69B (22.4 percent) in 2014;
- 10 of 12 large utilities met **WBE requirement** of 5 percent; 2 did not meet requirement; and,
- Procurement dollars with **WBE** increased from \$2.21B (9.4 percent) in 2013 to \$2.4B (9.45 percent) in 2014.

Small utilities = utilities with procurement of \$150M or less (i.e. AT&T Long Distance, California American Water Co., US Cellular, Wild Goose, LLC, SureWest Telephone, Park Water Company, etc.):

- Overall **WMDVBE** procurement increased from \$170M (17.72 percent) in 2013 to \$202M (21.07 percent) in 2014 exceeded;
- Procurement dollars with **MBE** increased from \$114M (11.94 percent) in 2013 to \$127M (13.27 percent) in 2014;

- 8 of 21 small utilities increased **MBE** procurement;
- 11 of 21 small utilities increased **WBE** procurement; and,
- Procurement dollars with **WBE** increased from \$50M (5.21 percent) in 2013 to \$67M (6.99 percent) in 2014.

As part of the program's outreach to businesses, CPUC annually hosts two (2) small business expos.

11.3.10 STATE OF CALIFORNIA – DEPARTMENT OF GENERAL SERVICES (DGS) – SLEB PROGRAM CERTIFICATION

The California State Department of General Services administers a self-certification program aimed at helping SBEs compete against non-SBEs for State contracts and purchases. The Department of General Services (DGS) Procurement Division (PD) sets state procurement policies and provides purchasing services. It delegates purchasing authority; certifies small and/or disabled veteran businesses to do business with the state; sponsors the Small Business Council; participates in the Disabled Veterans Business Enterprise Council; and provides innovative purchasing methods that save taxpayers' dollars, integrating quality solutions to meet customers' needs. The DGS PD, Office of Small Business and DVBE Services (OSDS) is the State's certifying agency that administers the Small Business and DVBE Certification Programs.

Technical Assistance Workshops include:

- How to do business with the State
- Hands-on Certification
- Disadvantaged Business Enterprise (DBE) Training
- Public Works and Purchasing Showcase
- Business Matchmaking
- Meet the Buyers

Cal eProcure Webinars

- Assist the business community with the statewide transition to Cal eProcure, the California Procurement & Contracting Academy (Cal-PCA) and the Communication & Outreach Section will be offering live webinars regarding the Cal eProcure registration and SB/DVBE certification; and,

- Webinar training includes: Supplier registration, SB/DVBE certification.

11.4 MANAGEMENT AND TECHNICAL ASSISTANCE PROGRAMS

11.4.1 CONTRA COSTA SMALL BUSINESS DEVELOPMENT CENTER

The Contra Costa Small Business Development Center (SBDC) is a partnership program of the U.S. Small Business Administration (SBA). The SBA partners with roughly 1,000 SBDCs throughout the country. The Contra Costa SBDC is part of the Northern California region, which is comprised of 13 small development centers in the area including: Alameda County, San Francisco, Silicon Valley, Napa, and Marin, to name a few. The Contra Costa SBDC is partially funded by the Small Business Administration (SBA); other sources of funding include Community Development Block Grants (CDBG) and the Governor's Office of Business and Economic Development (GOBIZ).

SBDCs are expected to match federal dollars that come into the Contra Costa SBDC jurisdiction with local cash. For every dollar SBA awards a center, the SBDC center director is expected to match with 50 cents. In 2015, Contra Costa was awarded \$225,000 and its budget was about \$360,000, much lower than previous years.

Each SBDC operation is different. Contra Costa has focused on manufacturing, the construction trade, and apprenticeship programs to build sectors creating jobs that are relevant to people within the community. The Contra Costa Center delivers individualized advising and training in collaboration with community partners to small business owners in Contra Costa County seeking assistance in starting, growing or managing operations. All services are no cost. The type of assistance provided includes:

- One-on-one advising
- Capacity building workshops
- Business modeling sessions
- Marketing and business planning support capacity building; and
- Training programs for entrepreneurs

In addition, the Governor's Office of Business and Economic Development (GOBIZ) created a competitive grant process two years ago to help SBDCs to support small businesses and entrepreneurs to access capital.

The SBA requires the Centers to assess all projects for potential economic impact milestones. Therefore, data collection is an integral part of the SBDC business model and helps the

organization to assess projects. SBDC's numbers reported to SBA are self-reported and capture baseline information on five main outcomes defined by the SBA:

- A new business start
- Jobs created
- Jobs retained
- Sales increases (year over year)
- Equity or debt investments into the business

11.4.2 CALIFORNIA RESOURCES AND TRAINING (CARAT)

California Resources and Training (CARAT) is a private non-profit founded in 1994 to integrate and build the capacity of the technical assistance industry in California. As a statewide initiative, CARAT's focus has been on enhancing the quality of technical assistance throughout California. CARAT's intent is to assist in building capacity and encourage and stimulate partnerships between lending institutions and technical assistance providers. CARAT was established as a partner to the California Economic Development Lending Initiative (CEDLI), a for-profit, multi-bank community development corporation whose mission is to expand capital access to small business and community development efforts. As a team, the mission of this partnership is to enhance community and economic development in California.

A. Technical Assistance

CARAT works primarily with minority- and women-owned businesses to assist them in developing skills around technology solutions that will enable them to increase sales and improve the operation of businesses. All services are provided free of charge and include the following support:

- Create or re-design client websites to market or sell products online;
- Employ digital marketing techniques to expand market presence;
- Utilize social media strategies to attract and engage customers;
- Set up effective tracking systems to manage and grow customer accounts;
- Develop processes to do business with government entities;
 - Free technology-based training workshops; and,
 - Training webinars in areas: Social Media, Digital Marketing, E- Commerce,

Website Design and Development, Collaboration Management, Customer Relationship Management (CRM), E-Procurement, Financial Management, and Purchasing and Inventory Management, Capacity Building Training.

B. Loan Assistance

CARAT partners with companies to assist small businesses with financial assistance, such as:

- California Economic Development Lending Initiative (CEDLI) Co-Lending Program Developed the Community Partners Program. Program is designed to certify and train selected business assistance providers to package loan applications for emerging businesses that are unable to qualify for conventional bank financing.
- Post Loan Business Assistance Program that trains and compensates business assistance providers to deliver financial analysis consulting services statewide

The CARAT has helped firms create 960 jobs over the past year.

11.4.3 ASIAN INC.

ASIAN, Inc. was created over 40 years ago to provide assistance to contractors and other Asian American firms in San Francisco that conduct business with the City. The organization was founded to help “level the playing field” and divide a larger “slice of the pie” for minority businesses, specifically those that do business in the public sector. For over 40 years, ASIAN, Inc. has worked to support its service community and the community at large by delivering core services in small business assistance, minority business development, supplier diversity and certifications to promote economic development on a broad scale.

ASIAN, Inc. is the operator of three Minority Business Centers on behalf of the U.S. Department of Commerce’s Minority Business Development Agency (MBDA). The Centers are part of a national network of more than 40 MBDA Business Centers located in major cities throughout the United States. The Centers work with minority business enterprises to generate increased financing and contract opportunities and to create and retain jobs.

The Centers provide a comprehensive array of effective business growth and development services that result in long-term, sustainable growth for minority business enterprise clients. Core Business Services include:

- Global Business Development
- Access to Capital
- Access to Markets

- Strategic Business Consulting

Since 2007, the MBDA Business Centers in San Francisco, San Jose and Fresno have led to the creation and/or retention of over 4,000 jobs. This was achieved by helping hundreds of clients obtain over \$760 million in contracts and capital.

11.4.4 SMALL BUSINESS ADMINISTRATION (SBA)

Since its founding on July 30, 1953, the U.S. Small Business Administration (SBA) has delivered millions of loans, loan guarantees, contracts, counseling sessions and other forms of assistance to small businesses. The mission of the U.S. Small Business Administration has delivered millions of loans, loan guarantees, contracts, counseling sessions and other forms of assistance to small businesses.

As mentioned in a previous section, the SBA partners with roughly 1,000 SBDCs throughout the country. The area served by BART is part of the Northern California region, which is comprised of 13 small development centers in the area including: Alameda County and San Francisco.

SBA provides assistances primarily through its four programmatic functions:

- Access to Capital (Business Financing)
- Entrepreneurial development (education, information, technical assistance & training)
- Government contracting (federal procurement)
- Advocacy (voice for small business)

These services are provided in the BART service area via SBA partners in previously described programs in Section 11.3, Small Business Programs and earlier in this section – Section 11.4, Management and Technical Assistance Programs. Additional SBA partner programs are described in the remainder of this section 11.4 and in subsequent Section 11.5, Financial Assistance Programs.

11.4.5 ANEWAMERICA – WOMEN'S BUSINESS CENTER

Founded in 1999, AnewAmerica is a non-profit organization headquartered in Berkeley, California that provides training and technical assistance to new American citizens, women, minorities, and low to moderate households in Berkeley, Oakland, Concord, Richmond, and San Jose.

SBA Women's Business Center

The Women's Business Center (WBC) at AnewAmerica is funded in part through a Cooperative Agreement with the U.S. Small Business Administration. The WBC assists women entrepreneurs by providing them with counseling, training, and technical assistance, according to client needs. Workshops and trainings include the following topics:

- How to create a financial business plan and understand financial tools
- Money management
- Access to capital
- City Resources
- Business planning
- Navigating permits
- Small business marketing strategies
- How to secure new contracts

WBC offices are located in downtown Berkeley and Oakland's Fruitvale district. No-charge services are provided in both English and Spanish. Non-English or Spanish-speaking clients can request assistance in other languages.

The organization is dedicated to helping traditionally challenged communities achieve the American dream through green entrepreneurship, asset building, social responsibility, and civic engagement.

From its beginning in 1999 through 2014, AnewAmerica has had the following outcomes:

- 60 percent of AnewAmerica's clients have been women
- 22,587 low-income entrepreneurs were provided with technical assistant
- Helped 728 clients start and expand businesses
- On average, clients have seen 9 percent asset growth over time and a 4.8 percent average annual change in net worth
- Client businesses have achieved a 68 percent success rate after 5 years

11.4.6 SOUTHEAST ASIAN COMMUNITY CENTER (SEACC)

The Southeast Asian Community Center or SEACC (originally the Center for Southeast Asian Refugee Resettlement or CSEARR) is a multi-service non-profit organization serving

small businesses in the Greater San Francisco Bay Area. SEACC's business support services include one-on-one technical assistance, credit evaluation and repair, business plan development, financial projections, marketing, business expansions, interpretation and translation services, and loan packaging. In partnership with the SBA SEACC administers one of the two SBA 7(m) Microloan programs in the San Francisco Bay Area and can make small business loans up to \$35,000.

A. Small Business Assistance and Loan Programs include:

- Micro-lending to startup and early stage businesses
- Referrals to banks for larger loans
- Startup issues for small businesses
- Buy-sell agreements
- Business licenses and permits
- Low cost guerilla marketing techniques
- Financial projections
- Multi-lingual services (English, Mandarin, Cantonese, Vietnamese, Tagalog)
- Business plan review and assessment
- Advice/consulting on other management issues

B. Business Consulting and Lending Programs - SBA 7(m) Microloan program

- Loan program for small businesses that need up to \$50,000 for an existing or start-up business

C. Technical Assistance

- Designed for small businesses located in San Francisco that have the potential to create new jobs and that need assistance on marketing, licenses/permits, lease negotiations, buy/sell agreements, business plan development, and small business loans
- Services under this program are available to all small businesses located in San Francisco
- Services are free of charge

- Offers periodic workshops for small business owners and entrepreneurs

11.4.7 THE SAN FRANCISCO LGBT COMMUNITY CENTER

Since its opening in 2002, the San Francisco Lesbian Gay Bisexual Transgender (LGBT) Community Center (Center) is currently the only non-profit in San Francisco serving all members of the lesbian, gay, bisexual and transgender communities. The mission of the Center is to connect the LGBT diverse community to opportunities, resources and each other to achieve the vision of a stronger, healthier, and more equitable world for LGBT people. The Center offers free services, like career counseling, job fairs, computer lab, social activities, mentorships, youth meals, daycare, and various workshops.

A. Small Business Services

The Center helps businesses throughout the spectrum of development lifecycle, and is creating jobs for the LGBT communities by helping LGBT entrepreneurs start and grow businesses. It offers a variety of programs, including one-on-one counseling, an innovative rapid credit-building microloan, workshops on access to capital preparation, small business mentorship and referrals to the LGBT small business development network. Services include:

- Business Counseling;
- Small Business Lending Circles—(The Lending Circles program is an innovative tool that can help entrepreneurs and small business owners steady cash flow, rebuild credit, pay down debt, purchase new equipment or rapidly build credit in order to access larger loans);
- B-Lab @ the LGBT Center (a free, drop-in incubator for growing small businesses) -- The Small Business Services team at the San Francisco LGBT Community Center hosts weekly gatherings for business owners and entrepreneurs in the community to share, learn and work towards goals;
- Small Business Mentorship;
- Lending Circles Credit Building Microloan Program; and,
- Small Business Resources.

B. Financial Services

The Center offers a variety of financial services, programs and workshops throughout the year that provide valuable information and resources to support the LGBT community in setting and achieving financial goals. Services include:

- First-time Homebuyer Program

- Financial Capability
- Affordable Rentals
- Lending Circles

C. Employment Services

The Center offers a range of services, events, and workshops tailored to support participants' job searches, to offer networking opportunities with potential employers and to connect to further training opportunities. In addition, the Center offers the nation's first transgender employment program, TEEI. Services include:

- Employment Services
- Networking Club and Workshops
- LGBT Career Fairs and Employer Spotlight Events
- Employer Partners and Diversity Training

11.4.8 OPERATION HOPE

Operation Hope's charge is empowerment and education of people interested in starting a business. The organization provides owners with business basics to open a business:

- Business license information
- Access to capital
- Tax ID creation
- State guidelines for starting business
- There is a 14-week entrepreneurial program hosted by Operation Hope
- Operation Hope helps to formalize ideas to create a business plan

Technical Assistance

- Review business plans with individuals
- Assist with access to capital
- 3-part series to help businesses obtain contracts

- o Partnership with minority-owned businesses facilitated around procurement and contracts and Federal Reserve hosted last workshop class (partnered with CPUC)

Operation hope does not offer financial assistance directly; instead, it offers bridges to financial assistance.

11.4.9 ALAMEDA COUNTY SMALL BUSINESS DEVELOPMENT CENTER (SBDC)

The Alameda County Small Business Development Center (SBDC) is a partnership program of the U.S. Small Business Administration (SBA). (See SBDC history under Contra Costa Small Business Development Center description in this report.) ACSBDC offers long-term, in-depth, no cost counseling for existing businesses and certain start-ups that have the potential for above average job creation, revenue and profit growth, and new business development ideas, which could stimulate economic development in Alameda County and beyond. ACSBDC clients have been business owners for more than one (1) year, have at least five employees, are profitable (cash flow positive) and able to grow sales and profits with ACSBDC assistance. Entrepreneurs with industry experience and financial resources to start a new business also qualify for ACSBDC services. The Center typically does not work with clients in the beginning stages of starting a business.

Alameda County Small Business Development Center (SBDC) coordinates with Procurement Technical Assistance Centers in Sacramento and Humboldt offering consulting support services and business seminars to its clients. The Centers provide SBA grant funding and tools and expertise to business owners interested in minimizing risk and accelerating success. The programs through the SBDC are: free of charge and include:

- Expert no-cost counseling
- Free seminars
- Successful Business Plans
- Video Marketing Techniques (ACSBDC/Chevron Technology & Social Media Series-6)
- Getting Certified and Doing Business with the Government
- Starting a Successful Business
- Website Development with E-Commerce Basics

- Search Engine Optimization to Acquire Customers for Your Business
- LinkedIn to Grow Your Business (ACSBDC/Chevron Technology & Social Media Series-7)
 - Women Entrepreneurs - Starting and Growing Your Business
 - Tax Tips and Strategy for Small Businesses
 - Accessing Capital for Your Business
 - eMarketing: Creating a New Customer
 - Buying a Business
 - Access to Capital
- Support in navigating licensing & permit issues and identifying resources
- Connects small business owners with Business Advisors to address challenges, seize opportunities and grow company's clients' bottom line
- Financial Assistance Preparation
- Customer acquisition (for larger firms)
- Includes: branding, marketing, social media, general presentation of the company (i.e. how to do events), to build up the credibility of the company, and deal with present issues.

Alameda SBDC objective is to guide small businesses and help to increase small businesses' success rates. The program measures success by the amount of money raised, jobs created, number of new businesses started, and increase in sales.

11.4.10 WESTERN REGIONAL MINORITY SUPPLIERS DIVERSITY COUNCIL (WRMSDC)

Western Regional Minority Supplier Diversity Council (WRMSDC) focus is on minority owned business (MBEs) helping them with access to corporate bid opportunities on local, regional and national levels. The Council certifies firms and maintains a qualified supplier database. Corporate members partner with Council to host outreach events to partner with MBEs to increase supplier diversity within corporate spending. The Council provides training and development for businesses:

- Business basics
- Effective marketing strategies
- How to respond to RFQ/RFP/bid process preparation
- Access to funding
- Training/Financial Management
 - May come directly from corporate partners/MBDA partners
 - WRMSDC may act as coordinators (i.e. registration) or deliverers of training material/presenters

11.4.11 CALIFORNIA STATE EAST BAY – SMALL BUSINESS DEVELOPMENT CENTER (SBDC)

The Cal State East Bay Small Business Development Center (SBDC), is a partnership between Cal State East Bay, the Northern California Small Business Development Center Network and the U. S. Small Business Administration. The SBDC offers classes, consulting services and business planning resources for small businesses throughout Alameda County. The Cal State East Bay SBDC is focused on developing and implementing programs and services that support small business growth and sustainable economic development. The Cal State East Bay SBDC is sponsored by Wells Fargo.

The East Bay SBDC offers numerous services to entrepreneurs and small business owners, including:

A. Classes

Taught by experienced instructors, low-fee courses tailored to fit entrepreneurs in any stage of the business development process, providing entrepreneurs and business leaders a way to learn and implement new strategies, skills and ideas across varied business disciplines.

B. Consulting

No-fee consulting services provided by business experts, Cal State East Bay faculty and MBA candidates have both industry and functional expertise in critiquing business plans, financial projections, market research, marketing plans and business strategy.

C. Special Programs

Low-fee services geared towards specific industries or needs, including Restaurant Assessment and MBA Student Research programs.

11.4.12 RENAISSANCE ENTREPRENEURSHIP CENTER

Renaissance Entrepreneurship Center (Renaissance) is a non-profit small business development organization dedicated to helping women and men traditionally lacking access to resources and information to achieve financial self-sufficiency through entrepreneurship. Renaissance provides training, support services, resources, and networks for business owners at every stage of business development, from idea feasibility through start-up growth and expansion.

Since the Renaissance Entrepreneurship Center's launch in 1985, it has helped more than 8,000 businesses launch, grow, and succeed. The Renaissance Entrepreneurship Center is offered at five locations: South of Market and Bayview/Hunters Point in San Francisco, East Palo Alto in the Mid-peninsula, San Rafael in Marin, and in Richmond. The Renaissance Center also offers off site program in Redwood City, Daly City, San Mateo, Foster City and Menlo Park. Services in Spanish are also offered in the Mid-peninsula and Marin.

Services

1. **Classes and Workshops**—Small Business Training Program, provides access to essential business building tools and information.
2. **Financing Resource Center (FRC)**—Financial education and access to capital help to small business owners to become better managers of business finances and understand growth opportunities.

Other financial assistance includes:

- Loan packaging
- Connections to banks, non-profit loan funds, private sources, and micro-grants
- Post loan support

Each year FRC secures an average of 24 small business loans and lines of credit totaling over \$1 million, and operates over 80 IDA accounts.

3. **Business Incubation**—On-site and virtual business incubation to help entrepreneurs start and grow businesses. The Incubator provides business support services, management assistance, and low-cost office space. Highlights of program successes include:

- Renaissance Entrepreneurship Center clients reflect the diversity of the Bay Area; 72 percent women; 65 percent minorities; 90 percent low-to-moderate income, and nearly one in eight have disabilities
- Annually provides support to more than 1,500 low-moderate income Bay Area women and men, and grows over 400 businesses that generate approximately \$28 million in revenue
- 94 percent of graduates entered Renaissance with an existing business remain in business
- 64 percent of businesses launched or grown employ two or more individuals, in addition to the business owner
- 52 percent of clients came to Renaissance in the pre-launch stage are now operating a business
- The median gross revenue of its clients in business full-time is \$60,000

11.4.13 RENAISSANCE ENTREPRENEURSHIP PROGRAM SOMA – WOMEN’S BUSINESS CENTER

In 2005, the Renaissance Entrepreneurship Center expanded to include a SoMa incubator, serving 24 emerging and established small businesses, and introduced advanced training classes, workshops and consulting services. Renaissance’s Women’s Business Center, a partnership with the U.S. Small Business Administration (SBA), provides business training, access to capital, access to markets and support strategies that are essential to the successful growth of new and emerging women entrepreneurs in the San Francisco Bay Area.

A. Services

1. **Industry Specific Training**—Targeted training, technology resources and customized technical assistance to help local construction industry entrepreneurs secure local contract opportunities and build internal capacities.
2. **Lease Strengthening and Business Attraction**—Services offered in Bayview Renaissance to help new/existing tenants/landlords create four multi-year leases and bring community servicing businesses there.
3. **Technology Training & Access to Technology**—Technology training cases in excel quick books, web design, on-line marketing, as well as access to technology in the small business technology lab in Bayview.

B. Goals

Since its inception in 1999, the Women's Business Center has served over 10,000 women through program services designed to meet the needs of women entrepreneurs in every stage of business development.

11.4.14 SCORE SMALL BUSINESS COUNSELING

Service Corps of Retired Executives (SCORE) is a national organization of retired business executives that provides technical and managerial counseling and training to people starting or operating a small business. SCORE is an organization of successful business entrepreneurs and industry executives volunteer to counsel and mentor businesses at no cost – from start-up to success. Offers free counseling and workshops including, how to start a business, business plans, financing availability and workshops that teach all aspects of business management.

In 2014, SCORE's volunteers donated 1.2+ million hours of time to help: start up 56,079 businesses, create 47,187 jobs, 107,201 Clients increased revenue, and mentor and train 148,800 small business owners and entrepreneurs.

Counseling Services include:

1. Business Advice

- Small Business Outlook
- Mentoring
- Business Plans

2. Startup Assistance

- Startup Basics (i.e. 10 ways to save money at startup)
- Business Ideas (i.e. starting a staffing business-what to think about)
- Franchising
- Success Stories
- Naming a Business
- Startup Financing
- How-to Guides
- How to Incorporate

Chapter XI

Race Neutral Analysis

- Legal Issues
- Buying a Small Business
- Home-Based Businesses
- Government Contracting
- Green Business

3. Run & Grow a Business

- Office and Operations
- Human Resources
- Leadership
- Innovations
- Growth Strategies
- Selling a Business

4. Marketing

- Online Marketing
- Marketing Ideas
- Finding Customers
- SEO
- Advertising
- Branding
- Customer Engagement
- Sales
- Social Media
- Marketing Strategies
- Pricing Strategy

5. Finance & Money

- Money Management
- Financing/Loans (i.e. Webinar 3/10: Understanding Business Credit)

- Personal Credit
- Taxes
- Accounting Basics
- Bookkeeping
- Budgets
- Payments and Collections
- Exit Strategy
- Selling a Business

6. Technology

- Website
- Internet & Online Business
- Apps & Software
- Office Tech
- Security (i.e. How to secure your data and computers)
- Mobile

7. Management

- Customer Service
- Employee Benefits
- Work/Life Balance

With the mission to foster vibrant small business communities through mentoring and education, SCORE's goal is to help 1 million clients by 2020.

11.4.15 SAN FRANCISCO PUBLIC UTILITIES COMMISSION – CONTRACTORS ASSISTANCE CENTER

The San Francisco Utilities Commission Contractors Assistance Center (Center) is an integral part of the City and County of San Francisco's effort to support economic, workforce and business development. The Center is a free resource that professional service firms, construction companies, vendors and suppliers can use to help establish or grow businesses. It is a service for small, local businesses to receive the tools and guidance needed to take advantage of the upcoming contracting opportunities created by the billions of dollars in

infrastructure spending planned for San Francisco. The SFPUC's Workforce and Economic Program Services Department (which is responsible for staffing the Center) works closely with other City departments and agencies to support that ongoing economic vitality. Offering a range of services, from technical assistance and classroom training to networking events and one-on-one counseling, the Center tailors its offerings to the specific needs of new and existing business owners.

In the Center, professional service firms, construction companies, vendors, and suppliers now have a unique and *free* resource that supports the City's economic vitality and strengthens its neighborhoods, commercial corridors, and the San Francisco workforce.

A. Services

- To provide the knowledge, real-time information, advice, skills, and state-of-the-art tools needed to help any business, especially small, local businesses to get access to, compete for, and perform on City contracting opportunities;
- To offer assistance getting certified with different government agencies and finding contracting opportunities that fit a firm's experience, expertise and capacity; and,
- To offer technical assistance and training, through classroom and one-on-one counseling, on topics like proposal/bid preparation, marketing, cash flow management, invoice preparation, and understanding government procurement requirements.

B. Highlighted Program Services

Per the Center's own documentation, its services include but are not limited to:

1. **Secure Necessary Certifications and Registrations** – help determine if a company is eligible for, and assist one's business with, the certification and registration process.
2. **Identify Contracting Opportunities** – help promote business and contracting opportunities that are aligned with business's experience, expertise, and capacity by providing access to its Plan Room and a database of City contracting opportunities.
3. **Assess Capital Requirements and Financial Risk** – help businesses identify and determine financial assistance for capital needs and future resources, as well as assess credit and the ability to obtain loans, bonds, and insurance.
4. **Networking Opportunities** – regularly host networking events, which provide opportunities for businesses to connect and collaborate.

5. **Plot Business Development Strategy** – offers training and counseling sessions to develop the growth strategy of one’s business using proven techniques and methods.
6. **Assistance Preparing Bids and Proposals** – offer classroom and one-on-one training to assist businesses in navigating solicitation packages, including documents and processes, reviewing project schedules, and determining quantities and preparing estimates.
7. **Learn the Skills Necessary to Coordinate Project Delivery** – offers training on how to properly submit a Request for Information or develop a project schedule to ensure on-time project delivery.
8. **Comply with City Programs and Get Paid** – offers training on compliance with City program requirements – Local Business Enterprise, Prevailing Wage, Local Hire – as well as the City’s different invoicing software programs.
9. **Develop a Financial Game Plan** – offers training in cash flow management, accounting and financial recordkeeping, so one’s business has all the tools necessary to grow with each contract.

11.4.16 SCORE EAST BAY

The mission of Score (previously described in this section) is to provide resources and expertise to maximize the success of existing and emerging small businesses. As a resource partner of the SBA, SCORE's free counseling service includes business plans, financing availability and workshops that teach all aspects of business management. SCORE East Bay serves clients in Alameda, Contra Costa & Solano counties at 24 convenient locations.

Services Provided:

- Resources
- Expertise
- FREE Confidential Business Counseling
- Entrepreneur Business Services
- Funding Alternatives
- Advice
- Workshops/Seminars, including:

1. General Business

- Business Startup Basics

- Finding Customers / Marketing Your Idea
- Finding Money
- Planning for Profit
- Writing a Compelling Business Plan

2. Business Specific

- Business Accounting
- Export - Import
- Opening/Operating a Restaurant
- Retail Basics for Online and Brick & Mortar Retailers

3. Social Media

- Effective Web Design & Online Lead Generation
- Online Marketing Strategy for Interior Designers and Building Trades Professionals

4. Special Workshops/Seminars

- Effective Consulting: How to start (or improve) your consulting business
- How to Get Started Writing a Business Plan – Seminar
- Legal Issues for the Small Business
- WordPress Training for Business Owners (2-Day Workshop)

11.4.17 CITY OF OAKLAND – BUSINESS ASSISTANCE CENTER

Opened October 14, 2009, the BAC (Business Assistance Center) is a one-stop information and referral center for businesses in Oakland. BAC offers full time staff to help business owners navigate the City government and provide referrals to local organizations, county, and state agencies, and other resources to start, operate, and grow businesses in Oakland. The Business Assistance Center offers:

A. Resources for Oakland businesses to receive services such as:

- Assistance with starting a new business,
- opening a new location, and
- opening a franchise;

B. Technical Assistance services include:

- Free website counseling,
- Technology resources,
- Classes
- Consulting with Small Business Development Center Technical Assistance Program (TAP)
- Oakland Adult School - web design and selling online

11.5 FINANCIAL ASSISTANCE PROGRAMS

11.5.1 TMC DEVELOPMENT WORKING SOLUTIONS

Working Solutions is a non-profit 501(c)(3) Community Development Financial Institution (CDFI) whose mission is to provide San Francisco Bay Area micro-entrepreneurs in the nine county San Francisco Bay Area with the access to capital and resources needed to start or grow a successful business. Working Solutions prioritizes serving low-income businesses and women and minority business owners.

Working Solutions began in 1999 as a workforce development program under the auspices of TMC Financing. By 2004, the organization had commenced its own micro-lending program. Since then, Working Solutions has combined its lending services with business coaching and mentoring programs.

A. Services Include:

- Financial Services
- Microloans (Small Business Loans \$5,000 to \$25,000 for start-ups; up to \$50,000 for existing businesses)
- Technical Assistance and One-On-One Support
- No-Cost Referrals to Local Business Resources
- Educational Presentations on Access to Capital.
- Business Consulting Program
 - Once small business owners get a Working Solutions loan, they are

automatically eligible to receive business assistance services through Entrepreneur Connect. Borrowers can choose from a variety of services tailored to fit specific business needs. These pro-bono services are available to clients throughout the life of the loans.

- Network Referrals
- Entrepreneur Connect Program Advisory

B. Program Impact Highlights:

As of August 2014, Working Solutions has served:

- 58 percent women entrepreneurs
- 45 percent minority entrepreneurs: 15 percent African American, 12 percent Asian American, 17 percent Latino, <1 percent Native American, 55 percent Caucasian
- 83 percent low or moderate income entrepreneurs

C. Financing

- \$7.7 million lent to small businesses
- 339 loans funded to date
- 159 new businesses created and 180 businesses expanded (47% loans funded to startups)
- 96% repayment rate
- \$22,900 average loan size
- \$9 million in larger SBA loans, conventional loans, and equity financing accessed after receiving a microloan
- 45 businesses have graduated to conventional financing
- Nearly \$1 million in grants made to 109 small businesses through partnerships with Whole Foods Northern California and the Napa Valley Community Foundation

D. Entrepreneur Education

- 12,407 entrepreneurs educated

- 2,349 entrepreneurs provided with pre-loan technical assistance
- 164 businesses connected with mentors
- 49 businesses provided pro bono legal services

E. Job Creation

- 665 jobs retained
- 454 jobs created

11.5.2 CITY AND COUNTY OF SAN FRANCISCO – OFFICE OF ECONOMIC AND WORK DEVELOPMENT – GRANT AND LOAN PROGRAM

The Office of Economic and Workforce Development's (OEWD) mission is to support the ongoing economic vitality of San Francisco. Under the direction of San Francisco's current mayor, Mayor Edwin M. Lee, OEWD provides city-wide leadership for workforce development, business attraction and retention, neighborhood commercial revitalization, international business and development planning.

OEWD offers a variety of grant and loan programs to small business owners, non-profits, and neighborhood groups. OEWD partners with community lenders, Working Solutions and Oakland Business Development Center (OBDC) Small Business Finance, to provide businesses with technical assistance, affordable financing, and support.

A. Grants offered through OEWD:

- Neighborhood Economic Development Grants support small business technical assistance and community driven commercial revitalization efforts. With input from the Historic Preservation Fund Committee (HPFC), OEWD provides historic preservation grants for preservation-related work in San Francisco, including education, feasibility studies, research and documentation, and the nomination of properties to state and federal registers.
- Americans with Disabilities Act (ADA) Small Business Assessment Program is designed to help small businesses ensure compliance with ADA regulations.
- SF Shines invests in commercial corridors through façade improvements which include grants for small businesses and non-profits, design services, and project

management.

B. Loan Programs offered through OEWD:

1. Small Business Revolving Loan Fund

The City-sponsored Revolving Loan Fund (RLF) is administered by Working Solutions, a non-profit 501 (c)(3) organization committed to serving new and existing businesses by providing access to capital, including micro loans, and technical assistance. The Revolving Loan Fund loans range from \$5,000-\$25,000 with loans \$25,000-\$50,000 available for established businesses with 2+ years in business.

a. Guidelines for the RLF are as follows:

- RLF microloans are up to \$50,000;
- Interest rates on RLF microloans are fixed and do not exceed 6 percent;
- RLF microloan terms are 5 years, fully amortized;
- RLF microloans can be used for start-up expenses, equipment, tenant improvements, working capital, and marketing; and,
- RLF microloans may not be used for personal expenses, debt consolidations, debt refinancing, or research/development of new products.

b. Preliminary parameters for borrower eligibility are as follows:

- An RLF borrower must operate a business that is located within the boundaries of the City and County of San Francisco; and,
- An RLF borrower must create or retain at least one full-time equivalent job.

2. StepAheadSF- Microloan Pilot Program

The StepAheadSF microloan program offers loans of up to \$10,000 to qualifying small businesses. The purpose of the StepAheadSF pilot program is to provide loans to support small businesses, boost local economy, and create jobs. The program is administered by Working Solutions and will provide loans for three year terms at 8-10 percent interest rate.

- \$5,000 to \$10,000 business loans
- Start-up and existing businesses
- Prompt approval and funding

- 3-year term, 8/10 percent interest rate

Borrowers should expect a much quicker turnaround time of 4 weeks, and less paperwork. Working Solutions will draw on qualitative information – getting to know the borrower, learning about the business, and understanding the local market – to better assess risk and successfully make loans to a wider group of small businesses.

3. Emerging Business Loan Fund

The Emerging Business Loan Fund (EBLF) offers loans ranging from \$50,000 to \$1,000,000 to qualifying commercial projects. The purpose of the Emerging Business Loan Fund is to originate commercial loans that support high impact businesses and projects with the potential to increase economic activity in San Francisco as well as create jobs for low to moderate income individuals. Community lender, OBDC Small Business Finance, manages the Emerging Business Loan Fund for the City and County of San Francisco.

Guidelines:

- Loan amounts from \$50,000 - \$1,000,000;
- Interest Rates: Currently from 4.5 percent to 7.25 percent (Prime + 4 percent), depending on product, No application fee, low closing costs;
- Up to 10-year loan amortizations, longer with real estate;
- Flexible underwriting criteria, eligible uses include: working capital, equipment, real estate, and tenant improvements;
- An RLF borrower must operate a business that is located within the boundaries of the City and County of San Francisco; and,
- An RLF borrower must create or retain at least one full-time equivalent job.

4. Kiva Zip's Microlending Program

The Office of Small Business is a trustee for the Kiva Zip program to identify and recommend small businesses to Kiva Zip for a \$5,000 loan with 0 percent interest. The Office of Small Business works with small businesses to develop a profile for the crowdfunding site.

11.5.3 OAKLAND BUSINESS DEVELOPMENT OPERATION (OBDC)

The mission of the Oakland Business Development Operation (OBDC) is to create economic opportunity by empowering entrepreneurs within the San Francisco Bay Area. Through innovative partnerships, OBDC provides business owners with capital, education, and

relationships that allow them to flourish. Since 1979 OBDC has empowered small business owners in the Bay Area, beginning in Oakland and expanding to serve San Francisco and veteran-owned businesses throughout California. OBDC's core services help small businesses expand in size, increase profits, and reach goals.

Services

Small Business Loans—Including micro and small business term loans with low fees and competitive interest rates.

Business Advising—One-on-one business advising is available during the loan application process and while paying the loan.

Post Loan Education—Its post-loan education platform includes workshops, roundtables, and an online platform to engage with fellow borrowers.

OBDC'S goal is to help its borrowers create jobs and stimulate economic development in low-to-moderate income communities, through a collaborative approach. OBDC endeavors to harness the power of entrepreneurship to transform lives and communities.

In the last 10 years OBDC closed 600 loans that totaled more than \$41,000,000. OBDC's borrowers have created thousands of new jobs in the Bay Area. Out of the total number of businesses that OBDC served, 50 percent were women-owned, 47 percent are minority-owned, 55 percent are low-to-moderate income owners, and 58 percent are start-ups.

11.5.4 PACIFIC COMMUNITY VENTURES (PCV)

PCV was launched in 1999 by two former Silicon Valley executives saw the resources being made available to venture-backed tech startups (access to working capital, expert business advice, and extensive networks) and knew that independent businesses on Main Street would benefit from the same resources. PCV is a non-profit organization affiliated with three for-profit investment funds. PCV also offers entrepreneurs access to valuable business development resources through various programs and services. PCV works with small business owners in underserved communities.

Services

PCV Small Business Advising—creates economic opportunity by empowering entrepreneurs. PCV matches small business owners with expert business advisors and mentors provide tailored, hands-on assistance to grow businesses.

PCV Small Business Loans—helps communities grow by investing in people building

businesses and generating jobs in those neighborhoods. PVC provides small business loans to entrepreneurs across the state of California, in the amount of \$50,000 – \$200,000 with a focus on underserved borrowers such as women, minorities, and veterans.

PCV InSight—research and consulting practice, provides information and analysis to clients with the goal of driving capital to social purpose. PVC provides customized research, strategic analysis, and advisory services to investors, policymakers, and market intermediaries to measure and communicate the social outcomes of a firm’s investments and increase a firm’s impact. PVC’s work has influenced capital markets both domestically and globally for over a decade.

PCV’s unique ecosystem of programs work together to catalyze the creation of community wealth and to drive lasting, positive economic change for working people in the neighborhoods that need them most. PCV’s programs strengthen local economies, create new quality jobs, and stimulate private and public investment in underserved communities.

Since its start, Pacific Community Ventures has helped over 4,000 small businesses grow and create tens of thousands of jobs in neighborhoods that need them most.

11.5.5 COUNTY OF ALAMEDA – CONTRACTOR BONDING ASSISTANCE PROGRAM (CBAP)

In response to issues raised concerning bonding as a barrier to small local, minority and women contractors, Alameda County Administrator's Office established the Contractor Bonding Assistance Program (CBAP) within Risk Management in 2008. Demand for internal consulting on insurance and bonding for County construction contracts continues to increase with the commencement of new capital improvement projects. Risk Management sponsors the CBAP, which is designed to reduce surety market barriers to small, local businesses bidding on County contracts. CBAP is designed to help small local contractors obtain bid, payment and performance bonds and/or increase bonding capacity for work on Alameda County contracts.

CBAP assembles a team of professionals to assist small local contractors in preparing for the bonding process and to help them grow businesses. CBAP guides the contractor through the bonding process with one-on-one consultations and contractor-focused group workshops and seminars. CBAP will also work with contractors to help them improve existing relationships with surety providers. Guarantees up to 40 percent of the bond amount or \$750,000, whichever is less, will be available to qualified contractors.

Contractors meeting the following requirements are eligible to participate in the program:

- Located in Alameda County and Eligible to participate in one of the following

certifications:

- Alameda County Small Local Emerging Business (SLEB)
- State Small Business Enterprise (SBE)
- US Department of Transportation Disadvantaged Business Enterprise (DBE)

Once eligibility has been established, the program participant receives a description of the bonding process and a one-on-one confidential assessment of the company's financial strengths and needs with regard to obtaining bonding for an Alameda County contract. Technical assistance and strategies are then provided to address the contractors' specific needs. Program staff will assist program participants in preparing documentation for bonding applications and make necessary referrals to program partners. There is no charge for enrolling in the program or for CBAP-sponsored workshops and seminars. Contractors are responsible for payment of bond premiums.

11.5.6 RICHMOND COMMUNITY REDEVELOPMENT AGENCY, OFFICE OF ECONOMIC DEVELOPMENT

The Office of Economic Development (OED) operates as part of the City of Richmond as Successor Agency to the Richmond Redevelopment Agency. The City of Richmond's Revolving Loan Fund (RLF) is a community based program with the goal of fostering local economic growth through the creation and retention of employment opportunities for Richmond residents and complementing community and individual development initiatives.

The City of Richmond encourages the development of new businesses and the expansion of existing businesses. Existing businesses within the City of Richmond or businesses planning to locate within the City of Richmond are encouraged to apply.

Types of Loans

The RLF provides four loan options to business owners:

- Working capital—for the costs of business operations;
- Machinery/equipment—for the acquisition of machinery and equipment;
- Fixed assets—for leasehold improvements, renovation, expansion of a structure, or purchase of fixed assets; and,
- Facade improvements—for improving the exterior appearance of a business.

Loan amounts range from a minimum of \$5,000 to a maximum of \$100,000. Loan

applications are reviewed by the RLF Board.

11.5.7 INNER CITY ADVISOR (ICA)

ICA and Fund Good Jobs endeavor to create good jobs by partnering with entrepreneurs committed to being good employers, seeking to create high-quality jobs for people with limited access to economic opportunity. ICA and Fund Good Jobs work in tandem to support business owners in accessing investment capital, plan for sustainable growth, build strong leadership teams, and hire and retain people in the community experiencing barriers to employment.

A. Services

ICA Fund Good Jobs Education - This program emphasizes business fundamentals and supports mission aligned entrepreneurs in developing frameworks for stabilizing, leading and growing businesses. It provides educational experience for entrepreneurs through partnerships with Michael C. Bush's 8 Factors Business Framework, the Mills College Graduate School of Business, and Impact HUB Oakland. Offerings include a host of annual workshops and seminars, as well as Growth Strategies and Start-Up Strategies courses.

ICA Good Jobs Accelerator - The Good Jobs Accelerator works deeply with 8 -10 companies to build a strong foundation for sustainable growth and good job creation. Entrepreneurs who have attended Growth Strategies and have had financials reviewed by ICA through Path 2 Cash are eligible for the accelerator.

ICA Capital Investment Program - ICA capital is currently invested in 5 companies referred through ICA's capital preparation support programs. Each company has a tailored work plan to achieve revenue growth and job creation targets, mitigate risk, and ensure a favorable return on investment for the fund.

B. Goals and Program Impact

As of September 2015, Fund Good Jobs has invested approximately \$2,000,000 in five companies. These companies have:

- Leveraged over \$6,700,000 in total capital;
- Grown jobs by 51 percent over 2014;
- Employed over 100 people and provided benefits to 65 percent of full-time workers; and,
- 60 percent are owned by people of color and 40 percent by women.

11.5.8 MYPATH

MyPath (formerly Mission SF Community Financial Center) is a national non-profit based in San Francisco. MyPath was initially established as the non-profit affiliate of Mission SF Federal Credit Union until MyPath spun off as an independent non-profit in 2011.

MyPath engages cities, non-profits, financial institutions, and policymakers to bring about systems level changes to tap these first income streams, and support low-income working young people to develop financial capability, unlock potential, and create better futures. MyPath provides training and technical assistance to build financial capability pathways and embed them in local youth workforce systems, as well as tools to measure effectiveness and impact.

Services

Technical Assistance—MyPath provides training and technical assistance to city agencies, non-profits, and financial institutions with the goal of supporting them to build youth financial capability pathways and embed them in youth workforce systems and programs. MyPath has generated a wealth of best practices, tools and lessons from ten years of designing, testing and scaling youth financial capability models with an array of partners.

MyPath Savings Program— MyPath Savings is a tested banking and savings model that seamlessly integrates key financial capability components into youth workforce programs.

MyPath provides workforce programs with the training and technical assistance needed to integrate these components into existing program cycles.

Impact:

- Since 2011, MyPath Savings has generated over \$1,000,000 in youth savings.
- 85 percent of MyPath Savings participants open savings and checking accounts; and 75 percent meet personal savings goal— on average saving 30 percent of the participant's income.
- MyPath Savings builds saving muscles, converting non-savers into savers. With two-thirds of participants reporting no savings at the start of the program, a remarkable 80 percent are saving after the program.

MyPath Credit— The only program of its kind in the U.S., MyPath Credit engages young adults in credit building and saving, increasing access to quality employment, quality financial products, college, entrepreneurship and housing. MyPath Credit combines credit-

building loans and savings products with one-on-one financial coaching.

Impact:

- 85 percent of MyPath Credit participants see an improved FICO credit score at the end of the program.
- MyPath Credit participants that start with no credit achieve average credit scores between 650 and 700 within six months of the program.
- MyPath Credit participants with damaged credit experience an average jump of 30+ points after six months of the program.

11.6 OUTREACH, MATCHMAKING AND NETWORKING

11.6.1 BAY AREA BUSINESS ROUNDTABLE

Bay Area Roundtable is a workforce development and business development organization that provides:

- Job and career training;
- Job placement assistance;
- Comprehensive programs that teach leadership and management skills;
- Small Business Matchmaking for certified W/M/DBE professionals to secure new business from corporate and public sector procurement partners;

A major project of the Bay Area Business Roundtable is the Urban Assistance Clearinghouse which provides direct services to small, local emerging businesses to increase contracting opportunities by providing provides the following outreach, technical assistance, Contract Labor Compliance Assistance, and policy analysis. The Clearinghouse is a direct result of study and measurement of five agencies, including Alameda County, BART, City of Oakland, EBMUD, and Port of Oakland.

Technical Assistance

- Roundtable hosts workshops (bid packaging, matchmaking events to provide access to certain networks/companies); and,
- Bid/Cost estimating courses.

The Bay Area Business Roundtable goal is to increase contracting opportunities by working with as many public and private agencies as possible, including Silicon Valley. The roundtable works to achieve this goal by:

- Hosting Roundtables with public and private executives;
- Business training; and,
- Quarterly outreach-business expos with various agencies and companies (state, federal and local government agencies) including matchmaking sessions.

11.6.2 CALIFORNIA ASSOCIATION OF MICRO ENTERPRISE (CAMEO)

California Association of Micro Enterprise acts as a network or “trade association” for those organizations providing business assistance and lending to low- to moderate-income business owners to increase wealth through business ownership. CAMEO is California’s statewide micro-business network made up of over 170 organizations, agencies, and individuals dedicated to furthering Micro-Business development in California. CAMEO provides technical assistance and business management training to small and micro-businesses. The organization helps businesses expand resources and build capacity through micro-business financing such as loans and credit, technical assistance and business management training.

CAMEO’s goal is to provide programs that educate the public on the economic impacts of micro-business through public awareness campaigns and advocate at the local, state and federal level for public policies that support the growth of micro-business, start-ups, and entrepreneurs.

Program Impacts in 2013 Impacts from Annual Survey were 2,049 loans under \$50,000 totaling \$26 million; average loan size of \$12,702. CAMEO’s membership generates approximately \$1.3 billion in economic activity.

Membership

- 181 Total Members
- 111 Micro Enterprise Development Organizations (MDO’s)
- 3 government agencies

- 26 Reciprocal Associations
- 25 Corporate and Government Partners

In addition to Women/Disabled/Minority-owned businesses, there is now an effort to include LGBT-owned businesses.

11.6.3 BUSINESS OUTREACH COMMITTEE (BOC)

The Business Outreach Committee (BOC), formed in November 2007, is a consortium of Bay Area transit and transportation agencies that assist Disadvantaged Business Enterprises (DBEs) and other small companies in doing business with Bay Area Transportation Agencies. BOC provides training, technical assistance, and relationship-building with agency staff and the contracting community of the San Francisco Bay Area.

BOC members also:

- Explain DBE program goals and needs to clients;
- Alert clients about upcoming Invitations for Bids (IFB) and Requests for Proposals (RFP) at individual agencies;
- Answer questions about specific bid opportunities;
- Offer DBE certification classes;
- Provide contact information of prime contractors on specific jobs;
- Add firms to appropriate bidders lists;
- Help DBEs locate support services; and,
- Assist DBEs with agency contracts.

BOC Member agencies include: AC Transit, Alameda County Transportation Commission, BART, County Connection, Caltrans, Delta Breeze, Golden Gate Bridge Highway and Transportation District, Metropolitan Transportation Commission, San Francisco Municipal Transportation Agency (SFMTA), SamTrans, San Francisco Bay Ferry, Santa Clara Valley Transportation Authority, Solano Transportation Authority (SolTrans), Transbay Joint Powers Authority, Western Contra Costa Transit Authority (WestCAT).

11.6.4 BUSINESSADVISING.ORG

BusinessAdvising.org is the division of Pacific Community Ventures (mentioned earlier in this report) that provides online business advising and mentoring to business owners in economically underserved communities throughout the country. Since the PCV was launched in 1999, BusinessAdvising.org continues to offer a number of activities for small business owners to get unique, relevant, and timely support from a pool of several hundred professional mentors from different industries and areas of expertise. For example:

- One-on-one mentoring (in areas such as marketing, finance and accounting, executive coaching, business planning, operations, etc.);
- Networking events;
- Educational events; and,
- Promotional opportunities for businesses within the BusinessAdvising.org network and to the general public.

Advisors are asked to spend, on average, 5 hours per month volunteering. Meetings can be in person, or through email, phone, or Skype. Advisors' responsibilities include: answering clients' questions, and give them the specific tools and problem-solving skills needed to sustainably grow the client's business; opening the network to small business owners; and offering pro bono services to business owners.

Most of the client participants in the program tend to meet the following criteria:

- Operating history of at least a year (i.e. beyond start-up phase);
- Annual revenues of at least \$150,000;
- 2+ full-time employees; and,
- Creating jobs in, or located in, economically underserved communities OR have a compelling social mission.

The goal of BusinessAdvising.org is to empower entrepreneurs to grow businesses and create new jobs for working people. Companies in the Business Advising program have increased revenues by 26 percent annually, and added jobs at eleven times the national rate.

11.7 ECONOMIC AND REVELOPMENT PROGRAMS

11.7.1 UNITY COUNCIL

The Unity Council (officially known as the Spanish Speaking Unity Council) was founded in 1964, and received 501(c)(3) tax-exempt status in 1968. The Unity Council is a non-profit community development corporation committed to enriching the quality of life of families primarily in the Fruitvale District of Oakland. Its mission is to help families and individuals build wealth and assets through comprehensive programs of sustainable economic, social and neighborhood development. Over the past 50 years, The Unity Council has been working towards its mission through a three-pronged strategy that incorporates social, economic, and neighborhood development programs and services:

A. Social Development Programs

The Unity Council has social development programs that offer opportunities for education, preservation of culture and language, and critical social services through meeting the needs of Oakland residents of all ages, first through early childhood education and parental involvement programs, through culturally relevant youth and young adult programming, and finally through a network of low-income senior services and supportive housing.

B. Economic Development Programs

Economic development programs offered by the Unity Council help individuals secure quality jobs, improve understanding of personal budgeting and finance, and increase personal savings. The Unity Council helps small business owners, job-seekers, and low-to-moderate income tax filers learn about how to earn more, save more, and be economically self-sufficient.

C. Neighborhood Development Programs

According to written documentation, the goal of the neighborhood development programs offered by the Unity Council is “to create attractive and vibrant communities filled with amenities that range from affordable housing, marketplaces and local businesses, to social services”. Since the 1980’s, the Unity Council has invested more than \$300 Million in community development funds in the Fruitvale which have created dynamic, transit-oriented and walkable neighborhoods in which to live and work.

11.7.2 RICHMOND COMMUNITY REDEVELOPMENT AGENCY, OFFICE OF ECONOMIC DEVELOPMENT

The Office of Economic Development (OED) operates as part of the City of Richmond as a Successor Agency to the Richmond Redevelopment Agency. Richmond's Office of Economic Development helps business owners relocate existing operations, works with entrepreneurs and investors to locate businesses for sale, and facilitate business-to-business transactions. Its goal is to offer community based programs that foster economic growth through the creation and retention of employment opportunities for Richmond residents.

A. Services

OED provides both business management and technical assistance programs and shares business resources and opportunities—most of these services are provided at no or reduced cost to business owners, including:

- Counseling
- Workshops
- Classes
- Business plans
- Marketing
- Credit repair
- Legal consulting
- Financing
- Employee recruitment
- Tax credit information
- Façade improvement
- Website design

B. Tax and Other Special Incentives Programs

The City of Richmond enables businesses to save thousands and even millions of dollars through a variety of tax credits and cost reductions.

- HUB Zone Empowers Business—As a designated U.S. Small Business Administration HUB Zone, Richmond helps certified small businesses gain preferential access to federal procurement opportunities, including competitive and sole-sourcing contracting, and a 10 percent price evaluation preference.

- California Economic Development Initiative—through the states GO-Biz program, businesses can compete for available tax credits based on the number of jobs created or retained, the extent of poverty in a business development area and minimum compensation limits.

11.7.3 GOVERNOR'S OFFICE OF ECONOMIC DEVELOPMENT (GO-BIZ)

The Governor's Office of Business and Economic Development (GO-Biz) was created by Governor Edmund G. Brown Jr. to serve as California's single point of contact for economic development and job creation efforts. GO-Biz offers a range of services to business owners including: attraction, retention and expansion services, site selection, permit streamlining, clearing of regulatory hurdles, small business assistance, international trade development, assistance with state government, and much more.

The Governor's Office of Business and Economic Development (GO-Biz) includes the following units:

A. Business Development (CalBIS)

The Business Investment Services Unit works with companies for expansion in California by streamlining the site selection process and offsetting the cost of doing business with the use of local, state and federal incentives.

B. Permit Streamlining

The Permit Assistance unit provides permit streamlining for business owners struggling with local, state and federal permitting for major job creating projects. The permitting team also administers the state's electronic on-line permit assistance center, CalGOLD.

C. Small Business Assistance

The Small Business Unit provides small business assistance through interagency projects, informational workshops, and direct advocacy. It also maintains a comprehensive list of resources for small business technical assistance, financing, and state procurement.

D. Innovation and Entrepreneurship

The Innovation and Entrepreneurship unit is the state's primary point of contact for promoting California's innovation infrastructure. It functions to develop an environment that encourages entrepreneurship, promotes long term economic growth and facilitates job creation through innovation. This unit is primarily responsible for the administration of California's Innovation Hub (iHub) Program.

E. California Small Business Loan Guarantee Program (SBLGP)

The purpose of the California Small Business Loan Guarantee Program is to encourage lenders to make small business loans that otherwise would not be made. Recognizing that small businesses are the backbone of the state's economy and the main drivers of private job creation, the SBLGP enables small businesses to not only obtain a loan otherwise unattainable, but to establish a favorable credit history with a lender. With that, the business may obtain further loans on its own, without the assistance of the program.

F. California Infrastructure and Economic Development Bank (I-Bank)

The California Infrastructure and Economic Development Bank (I-Bank) was created in 1994 to finance public infrastructure and private development that promote a healthy climate for jobs, contribute to a strong economy and improve the quality of life in California communities. The I-Bank operates pursuant to the Bergeson-Peace Infrastructure and Economic Development Bank Act contained in the California Government Code Sections 63000 et seq. The I-Bank is located within the Governor's Office of Business and Economic Development and is governed by a five-member Board of Directors.

The I-Bank has broad authority to issue tax-exempt and taxable revenue bonds, provide financing to public agencies, provide credit enhancements, acquire or lease facilities, and leverage State and Federal funds. The I-Bank's current programs include the Infrastructure State Revolving Fund (ISRF) Program, 501(c)(3) Revenue Bond Program, Industrial Development Revenue Bond Program, Exempt Facility Revenue Bond Program and Governmental Bond Program.

G. International Affairs and Trade Development

The International Affairs and Trade Development unit provides critical support on issues relating to international trade and investment opportunities, foreign relations, international agreements and partnerships with the countries that have a friendly relationship with California. The unit collaborates with federal, local and international partners to identify and assist small to medium size companies in developing markets abroad for products and services.

11.7.4 ROBERTS ENTERPRISE DEVELOPMENT FUND (REDF)

Since 1997, Roberts Enterprise Development Fund (REDF), a California-based non-profit that provides capital, resources, and know-how to build social enterprises that create employment for people struggling to land and keep a job. REDF's goal is to deliver the capital, procurement, hiring, and incentives that will make a real impact in expanding the social enterprise footprint nationally, so that many more people facing the greatest barriers to work

can find jobs. REDF's consulting services analyze new markets, develop business plans, and help partner companies roll out marketing strategies.

REDF grants provide start-up capital and funding to conduct day-to-day operations. Access to REDF networks creates connections between like-minded business partners that build organizational capacity. The tools, training, and resources REDF provided help the social enterprise companies measure effectiveness and run more efficiently.

REDF also supports Farber Program, which is a structured business school fellowship and internship that develops leaders willing take on the challenges and hard work of social enterprise.

11.7.5 HISPANIC CHAMBER OF COMMERCE OF SAN FRANCISCO (HCCSF)

Since September 2012, the Hispanic Chamber of Commerce of San Francisco (HCCSF) is an organization of businesses with a main function of promoting and facilitating business in the San Francisco and Bay Area. HCCSF stands for promoting business and preserving the traditions of its community. The HCCSF is formed as an umbrella organization to unite the efforts of four small ethnic chambers from the San Francisco Bay Area. The Nicaraguan-American, Salvadoran-American, Guatemalan-American and Latin American & Caribbean chambers have united in order to solidify Hispanic branding and to provide better access to capital and services to members by representing, advocating and the development of programs to provide the best access to business education, access to capital and the promotion of its members' businesses. The goal of HCCSF is to include every Hispanic/Latino and small business in San Francisco and the Bay Area to create partnerships, procurement opportunities, and to link small businesses and corporations, allowing a platform to assist in the growth of the community's financially, and economically.

11.7.6 CITY OF SOUTH SAN FRANCISCO

The City of South San Francisco provides services to existing businesses to help them succeed, and also offers incentives to business owners to assist and attract new business to South San Francisco. Services and opportunities available to business owners through the City of South San Francisco:

- Business License Information
- Upcoming Business Events Information
- Business Networking
- Business Support and Consulting
- Business Tax Information

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- Financial Resources and Incentives
- New Business Contacts
- RFP and Bid Opportunities

Small Business Assistance Program

The City is partnering with Skyline College to offer a Small Business Assistance Program to assist South San Francisco-based businesses with the cost of complying with federal, state and local laws relating to disability access requirements, trash enclosures, sewer connections and other such obligations imposed on small businesses.

The Program has two components: Grants and Support Services. The Support Services component focuses on one-on-one business advising targeted at South San Francisco-based businesses, as well as special events designed to support and assist small business. Interested participants are required to review and submit the Program Guidelines and Application. Specifically, the Center can help businesses with:

- Developing as well as making necessary adjustments to a business plan;
- One-to-one counseling to meet individual business needs;
- Referrals to other business programs, resources, and websites;
- Development of a strong marketing plan; and,
- Information on the U.S. Small Business Administration (SBA) Loan Programs and other resources.

11.7.7 SAN FRANCISCO ECONOMIC DEVELOPMENT ALLIANCE (SFEDA)

The San Francisco Economic Development Alliance (SFEDA) is a collaboration of non-profit organizations that provide training, funding and ongoing support for small- and micro-businesses in San Francisco. The SFEDA mission is to help low- and moderate-income San Franciscans improve quality of life by strengthening small businesses and microenterprises.

To achieve the SFEDA mission, SFEDA formalizes referrals between organizations, actively advocates at the City level for small businesses, leverages resources and best practices and maintains meaningful partnerships. By providing a comprehensive range of programs, SFEDA member organizations positively impact San Francisco's economy by helping entrepreneurs launch and grow businesses.

A. Members of the SFEDA include:

- Centro Community Partners Inner City Advisors

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- La Cocina
- Mission Asset Fund
- Mission Economic Development Agency OBDC
- Pacific Community Ventures Renaissance Entrepreneurship Center San Francisco SCORE
- SF LGBT Center
- Urban Solutions
- Working Solutions

B. Services

SFEDA provides small business services to entrepreneurs at every stage of organizational growth from idea development to exit strategy:

- Introduction to Business Classes
- Business Planning Classes
- Business Incubators
- Finding a Location
- Financing
- Consulting & Advising
- Classes & Workshops

11.7.8 SAN FRANCISCO AFRICAN-AMERICAN CHAMBER OF COMMERCE (SFAACC)

San Francisco African-American Chamber is primarily an advocacy organization. Its main effort is to work to obtain contracts for its members. The Chamber partners with large financial institutions to conduct workshops for technical assistance focusing on financial literacy and housing development.

There is a Chamber member represented at every major agency in San Francisco area. The Chamber has 20 committees in the areas of: micro-business, partnership, CPUC, veterans, board development, membership, and programs. These committees are established to assist businesses with the tools to survive in San Francisco.

11.8 ANECDOTAL COMMENTS FROM AGENCY DIRECTORS

As part of the race neutral analysis, interviews were conducted with 18 program directors of agencies that provide race neutral programs. The information from the interviews was used

to track anecdotal reports of experiences with small businesses in the San Francisco Bay Area, adding clarity to the current landscape of the small business community in the BART Region. To maintain the anonymity of the agencies, each was randomly assigned a letter to represent the agency and its comments.

11.8.1 IMPACT OF PROPOSITION 209

Among the directors interviewed, several agreed that Proposition 209 dramatically reduced the number of MWBEs awarded contracts in the BART Region, causing several to go out of business. In addition, in a study commissioned by the Equal Justice Society, entitled the Impact of Proposition 209 on California's MWBE's, the author, Tim Lohrentz estimates, "California's MWBEs loss somewhere between \$610 million to \$690 million annually (\$1 billion to \$1.1 billion in today's dollars) in public contracts due to Proposition 209. The biggest losses occurred with the State of California and city programs in San Francisco and Oakland."

Based on the organizations interviewed, the overall assessment of the climate of small businesses in BART's region is that the passing of Proposition 209 dramatically reduced the availability of minority businesses in the region, thereby reducing the number of contracts awarded to minority businesses.

Agency K recalled that prior to Proposition 209, "contractors where doing 18 percent DBE, and professional services 30 percent at one large state agency. After 209, the total participation (construction and professional services) in California went down to 3 percent DBE, with African-American's doing less than 1 percent." In a study conducted by UC Berkeley, Agency K reported that 80 percent of African American construction contractors in California went out of business after the passing of Proposition 209.

Agency A describes the impact of Proposition 209, and the recession that began in 2007 as a "one, two punch on MWBEs. Proposition 209 caused a major reduction in available contracts, and before African-American firms could see a recovery, the recession caused more reduction".

Agency F states that, the "passing of Proposition 209 ridded business of set-asides for minorities, so it has had a chilling negative impact on commitment to minority contracting and a pivot towards local based contracting, which is race-neutral." Additionally, as agency's budgets were reduced during the recession, many did not award as many contracts, thus further reducing minorities contracting opportunities.

Agency C reported losing a sizable number of MWBEs post-209. It was mentioned that since the State no longer utilized programs to ensure contracting diversity, contracts awarded to minorities and women decreased once Prop 209 passed.

Although Agency B did not see any direct impact from Proposition 209 on MWBEs, the agency did cite that generational poverty was more impactful, as well as equal pay issues.

11.8.2 LACK OF ACCESS TO CAPITAL

Directors also identified lack of access to capital as another obstacle to start-up, growth, and sustainability for MWBEs. Directors overwhelmingly agreed that MWBEs have an extremely difficult time obtaining business loans, especially African American-owned businesses. Some of the reasons cited are lack of resources, bad credit decisions, and generational poverty. Also, many African American business owners use the equity in homes to fund businesses. The 2007 recession caused a reduction in home values in the Bay Area, which negatively impacted African American business owners' ability to leverage capital in the forms of lines of credit and home equity for growth and cash flow.

Agency J and D pointed out that the recession had a damaging effect on minority-owned businesses' access to capital. Agency J cited that "the lack of access to capital became more challenging for African American business owners with the onset of the recession, because many African-Americans utilized their homes' equity to fund their businesses." In addition, the directors also pointed out that many African-American business owners suffered greater losses than other minority groups because of predatory lending practices, which caused major equity and home losses.

Although Latinos were also negatively impacted by predatory lending practices, many agencies reported a success growth rate in Latino-owned businesses, primarily Latino male-owned companies. However, many of these businesses remain challenged by access to capital too, which could curtail the ability to build capacity and create business sustainability overall.

Agency F and Agency A reported a trend in which organizations are developing programs to increase opportunities for women-owned businesses. Based on studies, women-owned businesses have a higher success rate than small businesses headed by males. Women business owners are identified as better money managers than men business owners and are associated with excellent multi-tasking skills. However, Agency F also noted that women tend to take on responsibilities for extended family and other duties, which impacts cash flow and ability to build capacity.

Agency H highlights a further example of how access to capital negatively impacts minority-owned businesses. The Agency points out that primes that do not pay MWBEs promptly impact the MWBE's cash flow and ability to sustain itself. The payment process can be very frustrating to small businesses that look to agencies to have policies in place for prompt payments in order to manage this process more efficiently.

The practice of implementing exceptionally high financial criteria and experience requirements excludes many MWBEs from bidding on contracts, because these standards cannot be met. This factor, highlighted by Agency G, causes exclusion of many MWBEs from the certification and contract bidding processes.

11.8.3 ACCESS TO DECISION MAKERS

The lack of access to decision makers awarding contracts prevents MWBEs from obtaining business and growing firms. Agency M felt that this was the primary challenge for many MWBEs. An Agency's lack of knowledge about MWBE performance capability greatly narrows the MWBE's chances of obtaining contracts from primes. Although many organizations provide networking opportunities for MWBEs that want to bid on contracts, at the end of the day, most organizations award contracts to companies that have an established business relationship from working on prior projects together. Agency J identified that many agency officials would rather work with familiar firms, as opposed to working with new diverse vendors. "Mainly it is about not knowing the vendor or letting one bad experience influence your decision to hire new vendors." Without an opportunity to demonstrate ability, MWBEs face a hard time securing work with primes.

Both Agency F and Agency H also observed that for Latino and Asian businesses, language barriers prevent these business owners from participating in networking opportunities. In addition, social and community isolation among ethnic groups, primarily Hispanic businesses, is a challenge that Agency B attributed to lack of access to decision makers and contract opportunities.

Agency M believes that access to decision makers will provide room for growth if public and private agencies make an effort to provide inclusion in contracts.

11.8.4 LACK OF ACCESS TO RESOURCES

Agency D expressed that in addition to the lack of financial resources, lack of access to technical assistance resources is a challenge that many minority and women owned businesses face. This lack of technical assistance impacts the ability to grow and compete in the marketplace. In order for small businesses to be successful, Agency D believes that more small businesses need to utilize the technical assistance provided in the form of training workshops, and webinars. Part of the services that Agency D provides is connecting small businesses to community partners that provide financial services for unconventional capital loans.

11.8.5 WILLINGNESS OF PRIMES TO UTILIZE MWBE'S

Agency M stated that when contractors do not have required MBE/WBE goals in place, most tend to revert to teaming up with familiar companies, which often are limited in diversity. During the interview, Agency A expressed that race-based goals/requirements increase the usage of MWBEs on contracts by forcing prime contractors to identify and use qualified MWBEs.

11.8.6 NO REAL DIFFERENCES

Agency H could not site any difference between the overall challenges of small businesses and the challenges specific to ethnicity. Other than immigrant groups having a language barrier, which made them more reluctant to seek additional support, and women challenged due to over burdening based on external family factors. All small businesses primarily faced the same challenges: limited resources related to cash flow, and economic recession impacts.

11.9 CONCLUSIONS

There are a significant number of race-neutral programs targeted to assisting and supporting DBEs, SBs and MWBEs. Some organizations continue to rely on goal-based programs to ensure DBEs, SBs and MWBEs participation in procurement opportunities. Though race-neutral programs within the Bay Area have made some progress in improving DBEs, SBs and MWBEs management skills, access to capital, and greater exposure to the larger business community, DBEs, SBs and MWBEs still face difficulty in gaining access to public and private sector contracting opportunities.

Additionally, while there have been some efforts to address capacity in the Bay Area and BART has seen slight increases in DBEs, SBs and MWBEs participation in contract awards in some industry categories, in general, the slow growth in increased capacity and awards remain an issue. As such, while race neutral efforts may have contributed in some degree to increased capacity and participation in contract awards, race neutral programs alone have not been fully effective in increasing availability, capacity or utilization of DBEs, SBs and MWBEs or eliminating disparity.

Given this result, the provision of management, finance and technical assistance via race-neutral programs, in and of itself, does not appear to adequately address issues and barriers faced by DBEs, SBs and MWBEs in the Bay area.

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| Agency/Organization | | Programs Offered | | | | | Program Types | | Specific Category | | | Support Services |
| Company Name | Program Name | Gov't | SBE | DBE | MBE | WBE | Mgmt /Tech Asst | Finc. Asst | Ethnic Chamber of Commerce | Other Chamber of Commerce | Economic Develop | Services |
| Alameda County SBDC | SBDC (Small Business Development Center) | X | X | | | | X | X | | | | Through expert no-cost counseling, top-notch free seminars and low-cost technology training, to support in navigating licensing & permit issues and identifying resources, the Alameda SBDC guides small businesses to increased success rates. |
| ASIAN, Inc. | | | | | | | | | | | | Certification, financing, networking, brokers subcontracting |
| Bay Area Business Roundtable | | | | | | | | | | | | Networking, advocacy |
| Bayview Business Resource Center (BBRC) | | | | | | | | | | | | Planning, skill building and industry specific workshops, financial education, access to capital, IDAs, one-on-one technical assistance, technology training, a women's business center, fashion industry network, graduate services, and a small business incubator program. |
| Business Advising.org | | | X | | | | X | X | | | | BusinessAdvising.org matches small business owners with volunteer business advisors who provide tailored, hands-on assistance to help small businesses grow and create quality jobs across the nation. |
| Business Outreach Committee (BOC) | | | X | X | | | X | | | | | The goal of the Business Outreach Committee (BOC) is to assist small disadvantaged and local firms in doing business with Bay Area Transportation Agencies. |

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| California Association of Micro Enterprise Opportunity | | | X | | | | X | X | | | | CAMEO is California's statewide micro- business network made up of over 170 organizations, agencies, and individuals dedicated to furthering Micro-Business development in California. CAMEO expand resources and build capacity for its member organizations that provide entrepreneurs with small and micro-business financing such as loans and credit, technical assistance and business management training. It also educates the public on the economic impacts of micro-business through public awareness campaigns and advocate at the local, state and federal level for public policies that support the growth of micro-business, start- ups, and entrepreneurs. |
| Cal State East Bay | Small Business Development Center | X | X | | | | X | | | | | Cal State East Bay Small Business Development Center offers classes, consulting services and business planning resources for entrepreneurs and small business owners. The Cal State East Bay SBDC is focused on developing and implementing programs and services that support small business growth and sustainable economic development. |

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| California Department of Transportation (—Caltrans) | Underutilized Disadvantaged Business Enterprise ("U/DBE") Certification | X | | X | | | | X | | | | To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs; to create a level playing field on which DBEs can compete fairly for DOT-assisted contracts; and to help remove barriers to the participation of DBEs in DOT-assisted contracts. |
| California Resources and Training (CARAT) | Small Business Technology Trainings | | X | | | | X | X | | | | As a statewide initiative, CARAT's focus has been on enhancing the quality of technical assistance throughout California and to expand capital access to small business and enhance the skill-sets of/and establish service delivery standards for business development organizations |
| Caltrans | | | | | | | | | | | | Add to Caltrans - CalMentor mentor/protégé program with many other public agencies participating in District 4 (Oakland office) |
| CAMEO | | | | | | | | | | | | Networking, training, financing |
| City and County of San Francisco | Office of Economic and Work Development - Grant and Loan Program | X | X | | | | X | X | | | | OEWD offers a variety of grant and loan programs to small business owners, non-profits, and neighborhood groups. OEWD partners with community lenders, Working Solutions and Oakland Business Development Center (OBDC) Small Business Finance, to provide businesses with technical assistance, affordable financing, and support. |

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| City College of San Francisco | Small Business Enterprise (SBE) Program | | X | | | | X | X | | | | It is the policy of the San Francisco Community College District to encourage and facilitate full and equitable business opportunities, specifically in the area of construction contracting, for all small businesses wishing to do business with the District. District staff will take affirmative steps to encourage Small Business Enterprises (SBEs) to participate on District construction public works projects at both the prime contractor and subcontractor level. Special effort will be undertaken to encourage small businesses to participate in educational opportunities available through the District that enhance their ability to perform work and business success. |
| City College of San Francisco | SMALL LOCAL BUSINESS ENTERPRISE (SLBE) | | X | | | | X | X | | | | District staff will take affirmative steps to encourage SLBE firms to participate in District construction and construction-related professional services work at both the prime contractor and subcontractor level. Special effort will be taken to encourage small, local businesses to participate in educational activities that enhance their ability to perform work. Outreach efforts will be targeted to new businesses, as well as existing businesses located in the City and County of San Francisco. |

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| City of Antioch, Economic Development Department | | | | | | | | | | | X | |
| City of Oakland | Local Business Enterprise / Small Local Business Enterprise ("LBE/SLBE") Certification | X | X | | | | ? | ? | | | | The City of Oakland has implemented policies that use the power of the public purse to provide economic opportunity and to stimulate economic development through the support and empowerment of the local community, especially those aspects of it that have been placed at a disadvantage in the past. |
| City of Oakland | Business Assistance Center | X | X | | | | X | X | | | | The BAC (Business Assistance Center) is a one-stop information and referral center for businesses in Oakland. Offers full time staff to help business owners navigate the City government and provide referrals to local organizations, county, and state agencies, and other resources to start, operate, and grow businesses in Oakland. |
| City of San Francisco | Office of Small Business/Business Assistance Center | X | X | | | | X | X | | | | The Office of Small Business, Small Business Assistance Center is the city's central point of information and assistance for small businesses and entrepreneurs located in San Francisco. It provides one-to-one case management assistance including information on required license and permits, technical assistance, financing options, and other business resources to help businesses start, grow, and thrive. |

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| Company Name | Program Name | Gov't | SBE | DBE | MBE | WBE | Mgmt /Tech Asst | Finc. Asst | Ethnic Chamber of Commerce | Other Chamber of Commerce | Economic Develop | Services |
| | | | | | | | | | | | | Services Provided: How to Start a Business in San Francisco (book) PDF Customized Checklist for Starting a Business Business Registration Requirements Business License and Permit Info Access to Capital - Small Business Loans Technical Assistance Providers & Business Support ADA Requirements and Your Small Business Business Classes and Workshops Legal Resources for Entrepreneurs Employer Mandates - Hiring Employees Zoning & Land Use Info & Assistance Building Permit Process Overview Government Contracting and Certification Other Business Resources and Programs |
| City of South San Francisco (Offered with City College of San Francisco- Mentioned above) | Small Business Assistance Program | X | X | | | | X | X | | | | |

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| Contra Costa County Small Business Development Center | Disadvantaged Business Enterprise Program | | | X | | | | X | | | | Providing assistance to DBE and small businesses in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, and providing services to help DBEs and other small businesses obtain bonding and financing; Providing technical assistance and other services to DBE and small businesses |
| Contra Costa Small Business Development Center | | | X | | | | X | X | | | | |
| County of Alameda | Small, Local & Emerging Business ("SLEB") Program Certification | X | X | | | | X | X | | | | The program was developed to promote and foster inclusiveness, diversity and economic development, as well as to provide on-going evaluation to ensure that all local businesses are provided equal opportunities in County contracting and procurement activities. |
| County of Alameda | Disadvantaged Business Enterprise ("DBE") Certification | X | | X | | | X | X | | | | The main objectives of the DBE Program are to ensure that small DBE firms can compete fairly for federally funded transportation- related projects; • To ensure that only eligible firms participate as a DBE firm; assist |

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| | | | | | | | | | | | | DBE firms in competing outside of the DBE Program. |
| County of Alameda | Contractor Bonding Assistance Program | X | X | | | | X | X | | | | The Contractor Bonding Assistance Program (CBAP) is designed to help small local contractors obtain bid, payment and performance bonds and/or increase their bonding capacity for work on Alameda County contracts. The program is sponsored by the County Administrator's Office Risk Management Unit and administered by Merriwether & Williams Insurance Services. |
| DBE Goodfaith | | | | | | | | | | | | Assists primes with outreach, brokers subcontracting |
| East Bay Municipal Utility District | | | | | | | | | | | | contracting opportunities |
| Governor's Office - GOBIZ | California Small Business Loan Guarantee Program (SBLGP) | X | X | | | | | X | | | | The purpose of the California Small Business Loan Guarantee Program is to encourage lenders to make small business loans that otherwise would not be made. Recognizing that small businesses are the backbone of the state's economy and the main drivers of private job creation, the SBLGP enables small businesses to not only obtain a loan it could not otherwise obtain, but to establish a favorable credit history with a lender. With that, the business may obtain further loans on its own, without the assistance of the program. |

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| Governor's Office of Economic Development | GoBiz-Office of Small Business Advocate | X | X | | | | X | | | | | The Small Business unit provides direct small business assistance to thousands of business each year with the help of our regional partners at the Small Business Development Centers. Over 95 percent of the +3500 assistance inquiries GO-Biz receives each year are from small business owners. |
| Hispanic Chambers of Commerce of San Francisco | | | X | | X | | X | | X | | | The Chamber empower every Hispanic/Latino small business owner and our membership by providing seminars, workshops, marketing, networking, legislative information and procurement opportunities to our membership. HCCSF stands for promoting business and preserving the traditions of the Hispanic/Latino community. |
| Inner City Advisors (ADDED 12/16/15) | | | | | | | | | | | | Technical assistance, networking (mostly Oakland) |
| Invest in Neighborhoods San Francisco | Office of Economic and Work Development- Biz Fit SF | | X | | | | | | | | | The Office of Small Business serves as the City's central point of information and referral for entrepreneurs and small businesses located in San Francisco. Case managers are available to assist entrepreneurs with information about starting a business; working with the City; navigating permits and licensing processes; and accessing other programs offered by the City and partnering non-profits. |

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| Mission SF Federal Credit Union | | | X | | | | | X | | | | Mission SF is a community-owned not-for-profit financial institution providing financial services to Mission area small businesses that are not served by mainstream financial institutions. Mission SF provides small business loans to low-income entrepreneurs who cannot qualify for a traditional bank loan, and other helpful loan products, including credit builder loans, and payday alternative loans. |
| Oakland Business Development Corporation(OBDC) | | | X | | | | | X | | | | OBDC's mission is to create economic opportunity by empowering entrepreneurs. Through innovative partnerships it provides business owners with capital, education, and relationships that allow them to flourish. |
| Operation HOPE | Small Business Empowerment Program | | X | | | | X | X | | | | The Operation HOPE Small Business Empowerment Program is designed for aspiring entrepreneurs from low-wealth neighborhoods. Operation HOPE combines business training and financial counseling with lending services so our clients get all the tools and resources they need to make their dreams a reality. |
| Pacific Community Ventures | | | X | | | | | X | | | | Pacific Community Ventures creates economic opportunities in low income communities. PCV achieves this mission through impact investing, entrepreneurship and thought leadership. PCV offers small business |

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| | | | | | | | | | | | | loans through its Small Business Advising Integrated Lending Loan Fund (SAIL Fund) to entrepreneurs in the Bay Area. |
| REDF | | | | | | | | | | | | Financial asst; tech asst (social enterprise only - double bottom line) |
| Renaissance Entrepreneurship Center & Bayview Resource Development Center (BBRC) | | | | X | | X | X | X | | | | Renaissance Entrepreneurship Center and the BBRC offer comprehensive small business training and support services for entrepreneurs at every stage of their business development, from start up to sustainability and growth. Services include intensive training classes on business start- up and business |
| Renaissance Entrepreneurship Program Soma | Women's Business Center | | | | | X | X | X | | | | Provides business training, access to capital, access to markets and support strategies that are essential to the successful growth of new and emerging women entrepreneurs in the San Francisco Bay Area |
| Richmond Community Redevelopment Agency, Office of Economic Development | Revolving Loan Fund | | | | | | X | | | | X | The RLF provides four loan options to business owners: Working capital—for the costs of business operations Machinery/equipment—for the acquisition of machinery and equipment Fixed assets—for leasehold improvements, renovation, expansion of a structure, or purchase of fixed assets Facade improvements—for improving |

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| | | | | | | | | | | | | the exterior appearance of a business Loan amounts range from a minimum of \$5,000 to a maximum of \$100,000. Loan applications are reviewed by the RLF Board. |
| Richmond Main Street Initiative, Inc. | Steps to a Successful Start-Up; Jump Start Your Business: Action Planning Workshop | | X | | | | X | | | | | New contracts, procurement updates. licensing and permits, business planning processes |
| San Francisco African American Chamber of Commerce (SFAACC) | | | X | | | | ? | ? | X | | | The San Francisco African American Chamber of Commerce (SFAACC) is one of California's most influential minority business organizations, representing and promoting African American business owners in San Francisco. Through advocacy and economic development, SFAACC is creating a firm economic base that supports the self- determination and survival of African American businesses. SFAACC is a non- profit 501c6 corporation. |
| San Francisco Economic Development Alliance | | | X | | | | X | X | | | | SFEDA is a collaboration of non-profit organizations that provide training, funding and ongoing support for small and micro businesses in San Francisco. |

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| San Francisco International Airport (—SFOLL) | Disadvantaged Business Enterprise ("DBE") Certification | | X | X | | | ? | ? | | | | The Airport Commission's Small Business Affairs Office (SBAO) conducts outreach programs to promote and ensure local, small and disadvantaged business participation in Airport concession leases and contracts (e.g. construction and professional services). |
| San Francisco Public Utilities Commission | Contractors Assistance Center | X | | | | | X | | | | | Offering a range of services, from technical assistance and classroom training to networking events and one-on-one counseling, the Center tailors its offerings to the specific needs of new and existing business owners. |
| San Francisco Redevelopment Agency -Office of Community Investment and Infrastructure Successor Agency to the San Francisco Redevelopment Agency | Small Business Enterprise ("SBE") Certification (?) | | X | | | | | | | | | Ensure that economically disadvantaged businesses are provided with an opportunity to compete for and participate in Agency assisted projects. The program has an overall SBE participation goal of 50 percent for prime contractors; and on contracts that have subcontracting opportunities, the goal shall be 50 percent. |
| SBA | The Women's Business Center at AnewAmerica | | | | X | | X | | | | | The Women's Business Center (WBC) at AnewAmerica provides training, counseling and other support services to help women entrepreneurs start and successfully grow their businesses. ALSO, PROGRAMS NOT GEARED SPECIFICALLY TO WOMEN. |

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| SCORE East Bay | | | X | | | | X | X | | | | Our mission is to provide resources and expertise to maximize the success of existing and emerging small businesses. As a resource partner of the SBA, SCORE's free counseling service includes business plans, financing availability and workshops that teach all aspects of business management. |
| SCORE Small Business Counseling | | | X | | | | X | X | | | | SCORE (Service Corps of Retired Executives) is a national organization of retired business executives that provides technical and managerial counseling and training to people starting or operating a small business. |
| Small Business Administration | | X | X | | | | | | | | | Since its founding on July 30, 1953, the U.S. Small Business Administration has delivered millions of loans, loan guarantees, contracts, counseling sessions and other forms of assistance to small businesses. |
| Small Business Administration | Small and Disadvantaged Business Certification,8(a) Business Development Program, HUB Zones (Three programs) | | X | X | | | X | X | | | | The Small Business Administration (SBA) operates programs to assist small disadvantaged businesses (SDB). |

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| Small Business Administration | SBA's Office of Women's Business Ownership (OWBO) | X | | | | X | X | X | | | | SBA's Office of Women's Business Ownership (OWBO) oversees the WBC network, which provides entrepreneurs (especially women who are economically or socially disadvantaged) comprehensive training and counseling on a variety of topics in several languages. |
| Small Business Development Center (SBDC) | | | X | | | | X | X | | | | The SBDC provides free, confidential one-on- one business counseling, hands-on workshops and access to capital for existing small businesses and ready to launch start- ups. SBDC services include counseling and assistance with business plans, financial projections and budgeting, operating challenges, loan packaging and more. Services are provided by SBDC staff and over twenty professional small business consultants with skills from business planning, financial management, bookkeeping, and marketing, to sales, technology, web design, wholesale, retail, and restaurants. |
| Southeast Asian Community Center (SEACC) | | | X | | X | | X | X | | | | The Southeast Asian Community Center is a multi-service non-profit organization serving small businesses in the Greater San Francisco Bay Area. SEACC's business support services include one-on-one technical assistance, credit evaluation and repair, business plan development, financial projections, marketing, |

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| | | | | | | | | | | | | business expansions, interpretation and translation services, and loan packaging. In partnership with the SBA SEACC administers one of the two SBA 7(m) Microloan programs in the San Francisco Bay Area and can make small business loans up to \$35,000. |
| State of California – Department of General Services (DGS) | Small Business Enterprise (“SBE”) Certification | X | X | | | | ? | ? | | | | The California State Department of General Services administers a self-certification program aimed at helping SBEs compete against non-SBEs for State contracts and purchases. |
| The SF LGBT Community Center | | | X | | | | X | X | | | | The San Francisco LGBT Community Center Business Development Program provides free expert one-on-one counseling to address a full spectrum of business planning and marketing needs. Special emphasis is placed on providing strategic support with loans, loan packaging, and post-loan technical assistance. The Center also offers regularly held group workshops on a variety of topics including marketing, business financing, sales, legal, human resources, and more. |

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| TMC Development Working Solutions | | | | | | | | | | | | To provide San Francisco Bay Area entrepreneurs with the access to capital and resources they need to start or grow a successful business. TMC prioritizes serving low-income businesses and women and minority business owners |
| Unity Council | | | | | | | | | | | | Business assistance, business opportunities at Fruitvale BART station |
| Urban Solutions | | | X | | | | X | X | | | | Urban Solutions' mission is to foster the well- being of disadvantaged communities by helping to increase neighborhood commercial vitality, strengthen small businesses, create jobs, encourage diversity and promote sustainability. Urban Solutions provides Small Business Consulting Services, Free Workshops, Business Attraction to revitalize the Sixth Street Corridor, Façade and Tenant Improvement, and Green Business Consulting in the South of Market and the Fillmore District. |
| Western Regional Minority Supplier Development Council | | | | | X | | X | | | | | NMSDC provides certified minority business enterprises (MBEs) the access, technical assistance, training and support needed to expand and market their services to prospective corporate buyers. Once certified and part of the NMSDC network, over two-thirds of MBEs confirm business |

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| | | | | | | | | | | | | increases due to their partnerships with the Council's corporate members. |
| Women's Initiative (WI) & ALAS | | | | | | X | X | X | | | | Women's Initiative serves low-income English and Spanish-speaking women, through its Spanish program ALAS in an all women environment. Women's Initiative provides a business management course, financial services including loan, technical support, peer support groups, access to markets, and coaching. WI manages its own relationship-based loan fund and IDA accounts in partnership with EARN. For program graduates WI offers, SuccessLink, a program that links graduates to each other and to experienced business women. |
| Working Solutions | | | | X | X | X | X | X | | X | | Working Solutions is a non-profit organization that supports entrepreneurs to start or grow successful Bay Area businesses. Their priority is serving low-income, female and minority business owners. They provide San Francisco Bay Area entrepreneurs with the access to capital and resources they need to start or grow a successful business. |

Source: Miller³ Consulting, Inc.

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Chapter XI

Race Neutral Analysis

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CHAPTER 12: CONCLUSIONS AND RECOMMENDATIONS

12.1 INTRODUCTION

Miller³ Consulting, Inc. (M³ Consulting) was commissioned by BART to conduct a Disparity Study to determine the level of availability of minority, woman and disadvantaged-owned businesses (M/W/DBEs) in BART's relevant market and the actual utilization of those firms in BART's contracting opportunities. M³ Consulting conducted several analyses for BART:

- Procurement Analysis
- Statistical Analysis of M/W/DBE Availability
- Statistical Analysis of M/W/DBE Utilization
- Statistical Analysis of M/W/DBE Disparity in Payments and Contracting
- Capacity and Regression Analysis
- Anecdotal Analysis
- Race-Neutral Analysis
- Private Sector Analysis

These analyses provide an overall picture of the environment faced by M/W/DBEs attempting to do business with and in BART.

12.2 CONCLUSIONS

12.2.1 SIGNIFICANT DISPARITY

Based on the statistical findings in the disparity chapter, the utilization of qualified firms as reflected by the percentage of contracts or purchase orders awarded and payments made, when compared to the availability of ready, willing and able firms (RWASM), appears to be less inclusive than warranted, thus M³ Consulting draws an inference of discrimination against the following race, ethnicity and gender groups:

| Table 12.1 | | | |
|---|---|---|---|
| Inference of Discrimination Based on Findings of Statistically Significant Disparity | | | |
| By Race/Ethnicity/Gender | | | |
| By Procurement Type | | | |
| By Federal/Non-Federal | | | |
| Procurement Areas | Overall | Federal | Non-Federal |
| A&E | <ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females |
| Construction | <ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females |
| Professional Services | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females |
| Other Services | <ul style="list-style-type: none"> • African Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Caucasian Females | <ul style="list-style-type: none"> • Hispanic Americans • Caucasian Females |
| Procurement | <ul style="list-style-type: none"> • African Americans • Asian Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Asian Americans • Caucasian Females |

Source: M³ Consulting

Below is a discussion of the factors leading to and impacting the findings of statistically significant disparities above. This discussion is followed by recommendations to address the factors creating the disparity. The recommendations include both race and gender-conscious and race and gender-neutral recommendations. These conclusions and recommendations should assist BART Board of Directors and BART staff to determine whether the disparity rises to a level of discrimination warranting the utilization of race and gender-conscious remedies within the parameters of the U.S. Supreme Court’s *Richmond v. Croson* decision and its progeny, including *Western States Paving v. Washington DOT*, decided by the 9th Circuit, along with 49 CFR Part 26 and Proposition 209.

**12.2.2 STATISTICAL FINDINGS IMPACTING STATISTICALLY
SIGNIFICANT DISPARITY**

A. Availability Issues

Based upon industry standards, M³ Consulting's practice, experience and understanding of data available, credence is typically placed on RWASM estimates derived from bidders, sub-bidders and awardees in that order of importance. Marketplace availability measures, based on D&B Availability, are presented as a benchmark of minority and women-owned firm availability (inclusive of certified and unverified MBEs/WBEs) and for BART to consider potentially available firms for outreach purposes.

Often, it is argued that actual availability, based on bidders, is significantly impacted by the presence of race and gender-conscious goals. BART's data reflects M/W/DBE participation in Construction, where BART does apply race and gender-conscious goals on Federal contracts, but to suggest that the difference is due to the utilization of DBE goals would be conjecture. This is highlighted even more by Utilization results, where BART has been able to achieve a greater proportion of M/W/DBE utilization in A&E and Professional Services areas, where race and gender-conscious goals cannot be applied.

Potentially, the difference in Potential Availability and Actual Availability could reflect the impact on Actual Availability of "But-For Discrimination", but it could also reflect the absence of outreach by BART to potentially available firms, as well. In other words, from the RWASM estimates, bidders, sub-bidders, and awardees are presumed to be actually available, whereas the D&B figures includes firms that may not be actually available due to discrimination or other factors. Significantly more research and analysis is necessary to determine the reasons for differences in availability levels between RWASM and D&B. Other than race and gender-conscious goals, such factors influencing the difference between RWASM Availability measures and D&B Availability figures could include, but not be limited to:

- Firms available in D&B, while falling into a North American Industry Classification System code utilized by BART, do not provide the specific goods and services required by BART;
- Firms within the D&B availability pool may not be interested in doing business with BART or in the public sector; and,
- As a public entity with consistent commitment in its Strategic Mission to community economic development, BART may be viewed by the community as a more inclusive environment, than the private sector or other public entities.

As the Office of Civil Rights begins to conduct inclusive outreach to and surveying of firms on the D&B list to determine their interest and ability to provide their services to BART and the willingness of unverified D&B Minority/Women-business enterprises to become certified to be eligible for BART's race and gender-conscious initiatives, more conclusive determinations can be made regarding the difference between RWASM and D&B availability figures.

B. Utilization Issues

Often, it is argued that actual availability, based on bidders, is significantly impacted by the presence of race and gender-conscious goals. BART's data reflects M/W/DBE participation in Construction, where BART does apply race and gender-conscious goals on Federal contracts, but to suggest that the difference is due to the utilization of DBE goals would be conjecture. This is highlighted even more by Utilization results, where BART has been able to achieve a greater proportion of M/W/DBE utilization in A&E and Professional Services areas, where race and gender-conscious goals cannot be applied.

Potentially, the difference in Potential Availability and Actual Availability could reflect the impact on Actual Availability of "But-For Discrimination", but it could also reflect the absence of outreach by BART to potentially available firms, as well. In other words, from the RWASM estimates, bidders, sub-bidders, and awardees are presumed to be actually available, whereas the D&B figures includes firms that may not be actually available due to discrimination or other factors. Significantly more research and analysis is necessary to determine the reasons for differences in availability levels between RWASM and D&B. Other than race and gender-conscious goals, such factors influencing the difference between RWASM Availability measures and D&B Availability figures could include, but not be limited to:

- Firms available in D&B, while falling into a North American Industry Classification System code utilized by BART, do not provide the specific goods and services required by BART;
- Firms within the D&B availability pool may not be interested in doing business with BART or in the public sector; and,
- As a public entity with consistent commitment in its Strategic Mission to community economic development, BART may be viewed by the community as a more inclusive environment, than the private sector or other public entities.

As the Office of Civil Rights begins to conduct inclusive outreach to and surveying of firms on the D&B list to determine their interest and ability to provide their services to BART and the willingness of unverified D&B Minority/Women-business enterprises to become certified

to be eligible for BART's race and gender-conscious initiatives, more conclusive determinations can be made regarding the difference between RWASM and D&B availability figures.

C. Capacity Issues

As disparities in procurement and contracting are often attributed to differences in capacity of Non-M/W/DBE and M/W/DBE firms, the capacity analysis sought to examine if there were any differences in capacity of firms based on race or gender that impact disparity outcomes and could hinder firms from being actually and potentially available to BART. Because the pool of 76 firms that have actually contracted with BART is too small to draw definitive conclusions, M³ Consulting can only conduct an analysis on the pool of total respondents that include potential and actually available firms. Therefore, this analysis does not support drawing conclusions on any disparity outcomes since the sample of respondents is too small to generalize toward the population of all firms. Moreover, on important questions that discussed contracts and awards, the response rate was even smaller overall.

Even so, M³ Consulting was able to draw some conclusions from the various capacity analysis conducted. We found that, while capacity differences do not appear to be distinct in the size of the firms based on revenues or full time employees based on race/gender or ethnicities, the constraints in capacities are more notable in business formation and factors related to the self-employment decision and earnings which include denials in bonds and loans/lines of credit.

12.2.3 QUALITATIVE FINDINGS IMPACTING STATISTICALLY SIGNIFICANT DISPARITY

A. Procurement

1. Procurement Process

BART operates in a fairly decentralized procurement environment, with sponsor departments having significant input on the "buy" decision in many instances. The decentralization is particularly evident in the procurement area of A&E, where the utilization of On-call (Indefinite Quantity contracts) provides Planning, Development and Construction significant control over the manner in which dollars are expended post-award through the execution of work plans. It is important to note that decentralized procurement alone is not the primary concern, but whether there is sufficient infrastructure support and organizational oversight to ensure transparency, accountability, efficiencies and above all, fairness and inclusiveness on an on-going basis.

On procurements that it does not directly procure, the Procurement Department serves in a mostly administrative role, particularly as it relates to change orders and work plans executed against IDIQs. In so doing, BART's procurement objectives of creating an inclusive, efficient, fair and open procurement process are sometimes secondary to providing Sponsor Department's the greatest degree of flexibility in achieving their departmental objectives. That flexibility has supported, in some instances, the ability of BART project managers, to continuously select favored firms through the work plan process in A&E. In other areas where the Procurement Department does directly procure, including Construction, BART's procurement process does not reflect an effort to include M/W/DBEs at the prime level on either formal or informal purchases. M/W/DBE participation is viewed as a Senior Management mandate, as opposed to a component of inclusive public sector procurement. M³ Consulting formulated barriers within the procurement system into the following areas:

- Lack of integration of diversity and inclusion throughout BART Strategic Plan minimizes organizational focus on achievement of DBE, SB and MWBE inclusion in BART opportunities as a policy objective.
- Decentralized procurement function without strategic oversight reduces BART's ability to develop an inclusive and sustainable procurement operation; lack of enterprise resource planning (ERP) integration further exacerbates problems caused by decentralization.
- Minimal procurement forecasting reduces BART's ability to engage in effective planning to meet BART's strategic mission of "economic prosperity" and to achieve inclusive procurement through its procurement opportunities.
- Underdeveloped vendor registration impacts BART's ability to effectively identify DBEs, SBs and MWBEs "ready and willing" to bid on BART opportunities, as well as reduces BART's ability to establish tailored project goals.
- While sealed bid and RFP processes are consistent with industry practice, over-reliance on broad on-call contracts and lack of price caps reduces BART's ability to ensure inclusiveness and sustainability in levels of M/W/DBE participation in these procurements.
- BART's approach to the issue of contractor/consultant substitutions reflects an organizational culture that is overprotective of prime vendor rights to the detriment of BART's rights, which includes BART's strategic mission, as well as subcontractors/subconsultants on BART projects.
- While BART's General Manager has exhibited leadership in promoting DBE, SB and MWBE participation through race-neutral programmatic initiatives and community outreach, the effectiveness of these initiatives are lessened by the issues outlined above, leading to greater organizational inefficiencies.

2. Data Infrastructure Challenges

Issues resulting from unchecked decentralization are greatly compounded by issues related to BART's data infrastructure. Given the size and complexity of many of BART's A&E and Construction contracts, some over \$300 million, a combination of decentralization and data systems limitations can mask operational issues that may have become discriminatory and exclusionary. As such, these factors can impact the accurate reporting of BART awards, commitments and payments, as required by 49 CFR Part 26, and the monitoring and reporting that the California courts³⁷³ have deemed allowable and appropriate under Proposition 209. We note that in an Equal Employment Opportunity environment, such inability to provide accurate and complete reporting on key decision-making impacting hiring, promotions and termination in and of itself could result in a finding of adverse impact. The procurement and DBE (federal) and MWBE (principally state and local) regulatory environment has not kept pace with EEO. Key data issues are summarized below:

- BART only implemented an online vendor portal in January 2016. Currently, only RFPs are available on-line. Previously, for notification of opportunities and solicitation, BART procurement specialists and buyers relied principally on individual lists of firms that each had developed.
- BART's bidder and sub-bidder data on formal contracts is maintained in hard-copy formats, as well as any written quotes solicited. Telephone quotes are not always recorded in any electronic formats. Furthermore, BART does not collect requisite data on a consistent basis, including age of firm and annual gross receipts for bidders and sub-bidders (and quotes) as required under 49 CFR Part 26.11. In 2013, OCR attempted to begin compliance with the data collection requirements of 49 CFR Part 26, however, such an effort requires collaboration with Procurement. BART does not have a system for collecting prime contractor's sub-bidder data. Data needed on a semi-annual basis to report DBE participation to FTA is performed through a manual data collection process.
- BART's award data is maintained in hard-copy formats in Procurement's bid files. OCR attempted to collect prime and subcontractor award and commitment data directly from BART's prime vendors through the Vendor Payment Tracking System, but this effort has not produced reliable information.³⁷⁴ Prime vendor commitment data is available from the PeopleSoft Financial Management system. Subcontractor

³⁷³ See *Hi-Voltage v. San Jose*, 101 Cal Rptr. 653, 671 (2000) and *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16 (2001).

³⁷⁴ As discussed in Chapter 4: Statistical Methodology, in a comparison of contract information by individual Contract ID, M³ Consulting was unable to match a significant number of contract and subcontract values reflected in the VPTS data to other sources of data, ie On-call data, Purchase Order data, Payments data and Contract awards data. Given that VPTS is designed to simply be a "storehouse" of information from these other sources, VPTS data should directly match contract values in these sources.

commitment data is potentially available through PeopleSoft in PDF invoices that may or may not reflect detailed subcontractor data.

- Because of BART's reliance on IDIQs cost plus contract vehicles (on-call contracts) for much of its A&E activity, BART's data systems can not accurately capture award and commitment data for A&E, as both are considered budgetary figures only. Definite quantities for A&E can be determined only at the point of payment at both the prime and subcontractor levels. OCR's Vendor Payment Tracking System does not include work plan data against the IDIQs. Only PDC's work plan summaries and invoices contain prime and subcontractor commitment (budget) and payments data.
- Payments data is maintained at the prime vendor level in the PeopleSoft financial management system. Subcontractor data may be gleaned through a manual effort from PDFs of invoices attached in PeopleSoft system. Subcontractor payments are maintained in disparate systems utilized by project managers in sponsor departments and resident engineers. OCR attempted to collect subcontractor payments through the Vendor Payment Tracking System. However, lack of systems integration impacts the reliability of this data system.
- These hard-copy, online and electronic databases are not integrated, thus limiting the depth of analysis that BART can conduct on the impact of its annual spend decisions on DBE, SB and MWBE participation, as well as BART's overall impact on economic development in the Bay Area. Furthermore, BART is not positioned to report on DBE, SB and MWBE participation in real-time, which reduces its ability to quickly respond to changes in DBE, SB and MWBE levels of participation on its contracting activity, until well after procurement spend has occurred, and often, after payment has already been made. Lastly, because complete and detailed procurement data is not available in easily retrievable formats, reporting to FTA on DBE participation on a semi-annual basis requires a significant data collection effort by OCR from different BART departments and data collection for disparity studies performed every five years is laborious, costly, and quickly outdated. Because OCR reports on the inclusiveness of the "buy" decisions made by Procurement and Sponsor Departments, it is dependent on the effectiveness and efficiency of data recorded by procurement decision-makers.
- This lack of procurement consistency, and its effect on perceived lack of accountability and transparency also compromises BART's ability to respond to community concerns in a manner that builds trust and goodwill.

A sound procurement system and data infrastructure is critical to meeting the spirit and intent of *Richmond v. Croson*. The U.S. Supreme Court did not intend for race and gender-conscious remedies to become permanent fixtures for public entities. Instead, these remedies should be utilized only when needed. Without adequate insight into organizational decision-making regarding procurement in real-time, BART does not have the flexibility to utilize this "tool" in an as-needed manner, quickly responsive to a changing, organic procurement

process. Additionally, if the California courts do indeed identify a set of facts requiring the utilization of race and gender-conscious remedies on non-federal procurement, this flexibility may also be a key requirement to addressing the courts' and voters' concerns on the utilization of such remedies as expressed in Proposition 209.³⁷⁵

B. Anecdotal

The anecdotal data from 49 participants was gathered through a series of 22 one-on-one in-depth interviews and five focus groups, which included 27 participants. Those interviewed included both minority and women business owners, as well as non-minority male business owners. The objective of the in-depth interviews was to capture the experiences, attitudes, issues, and perceptions of business owners seeking opportunities with BART, and with other public and private organizations in the San Francisco Bay area.

The anecdotal testimony tended to reflect the impact of BART's bureaucracy on the ability of DBEs, SBs and MWBEs to do business with the agency in a fair and open manner. Interviewees expressed concerns about the perceived large size of contracts, the repeated use of the same firms, BART's preference for large firms over DBEs, SBs and MWBEs, excessive red tape, and the unfair cancellation of contracts to DBEs, SBs and MWBEs, as well as the unwillingness to award to DBE, SB and MWBE at the prime level.

Interviewees also revealed perceived unfair practices by prime contractors including lack of serious consideration provided at matchmaking sessions, excessive bonding and insurance requirements for subcontractors, unwillingness to contract with DBEs, SBs and MWBEs listed on winning bid (being dropped after contract award), and derogatory comments and attitudes utilized. The contracting issues voiced by interviewees require more investigation by BART to determine whether Public Contract Code 4100, Fairness in Subcontracting and Subletting, is being violated as it relates to BART specific public works contracts.

The impact of the 2008 recession and Proposition 209 was also discussed by interviewees. These events have resulted in a decline in the number of DBEs, SBs and MWBEs in the Bay Area. The growth and development of these firms is also being impacted by the unavailability of skilled employees.

C. Private Sector

The local demographics in the San Francisco-Oakland-Fremont MSA includes about 54 percent Whites, a little over 19 percent Hispanic/Latino Americans and Asian Americans each, less than 8 percent African Americans. Of those persons who are in the labor force,

³⁷⁵ See *Coral Construction, Inc. v. City and County of San Francisco*, 50 Cal.4th 315 (2010).

Chapter XII

Conclusions and Recommendations

Hispanic Americans in the San Francisco-Oakland-Fremont MSA were represented to a greater degree, with 70.6 percent of the total Hispanic population participating in the labor force, compared to 67.6 percent of the White population. African Americans had the lowest level of participation in the labor force at 61 percent of the African American population, followed by Asian Americans at 66.0 percent.

It is expected that the differences in the availability of firms in the relevant market would be representative of these statistics. As such, it is important to study the degree to which the population is gaining education and experience that could lead to business formation. Because of the intense focus on inclusion of DBEs, MWBEs and SBs in construction by many public agencies, we focus here in these Private Sector Conclusions on that industry.

Among all racial and ethnic groups, Hispanic Americans have the greatest employment presence in construction in the San Francisco-Oakland-Fremont MSA, at 47.8 percent of Construction and Extractive Craft Workers and 52.3 percent of Laborers and Helpers. Asian Americans have some representation in all areas of construction, whereas African Americans have a relatively small presence in construction. Even so, in actual BART Construction availability and utilization, Hispanic American-owned firms do not significantly outpace other M/W/DBE proportions.

Further evidence of DBE and MWBE participation and penetration within the construction marketplace was obtained from Reed Elsevier (Reed), which is a private firm that surveys construction-related activity in various regions around the United States. The San Francisco-Oakland-Fremont MSA and the San Jose-San Francisco-Oakland CSA regions were reported for this disparity study. Reed bid and award data indicates that DBEs and MWBEs within the San Francisco-Oakland-Fremont MSA appear to obtain few construction sector projects, even in subcontracting opportunities. The Reed data is self-reported.

A more telling picture on M/W/DBE participation in the private sector emerges from a review of City and County of San Francisco Building Permits data.³⁷⁶ Over 95 percent of building permits, based on counts, were issued to Non-M/W/DBEs, compared to 80 percent in the public sector. Based on actual dollar values of these building permits, almost 98 percent went to Non-M/W/DBEs in both the Private and Public sector. Even when broken down into threshold categories, starting with \$0-50,000, Non-M/W/DBE participation was between 95-99 percent in the different categories. Despite earlier evidence from Census EEO data that Hispanic American dominated the construction industry occupations, in the public sector, no permit was issued to any Hispanic American-owned firm represented on the Master S/M/W/DBE certification list and only 0.01 percent and 0.3 percent of issued permits were

³⁷⁶ This did not include Alameda County and Contra Costa since the former was unresponsive and the latter sent data in unusable formats. Thus these two counties were not included in the data presented.

awarded to African American-owned firms and Asian American-owned firms, respectively. Caucasian Female-owned firms were issued 0.01 percent of public sector building permits.

Of the top 20 awardees of building permits for the FY 2010-15, a total of three D&B MWBE firms from the Master S/M/W/DBE certification list are among the top 20 awardees that received building permits. None of the three were among the RWASM firms within the relevant market for BART.

D. Race Neutral

M³ Consulting reviewed over 100 Management, Financial and Technical Assistance providers, along with Chambers of Commerce and other networking organization, in San Francisco, Alameda and Contra Costa County. Further, 18 Executive Directors were interviewed. Key concerns expressed by these leaders were as follows:

- Proposition 209 reduced the availability of contracting opportunities and reduced contracting activity to MWBEs;
- MWBEs have a very difficult time obtaining loans, especially African Americans. Some of the reasons cited are lack of resources, bad credit decisions, and generational poverty;
- The lack of access to decision makers who award contracts prevents MWBEs from obtaining business and growing their firms;
- Lack of access to and participation in management, technical and financial assistance programs;
- Unwillingness of prime contractors to utilize MWBEs, unless required to do so by governmental agencies.

M³ Consulting found that, while these organizations had some impact on improving DBEs, SBs and MWBEs management skills, access to capital, and greater exposure to the larger business community, DBEs, SBs and MWBEs still face difficulty in gaining access to public and private sector contracting opportunities. Additionally, while there have been some efforts to address capacity in the Bay Area and BART has seen slight increases in DBEs, SBs and MWBEs participation in contract awards in some industry categories, in general, the slow growth in increased capacity remain an issue. While race and gender-neutral efforts may have contributed in some degree to increased capacity and participation in contract awards, race and gender-neutral programs alone have not been fully effective in increasing availability, capacity or utilization of DBEs, SBs and MWBEs.

12.3 RECOMMENDATIONS

In light of the findings discussed in the previous chapters and the detailed conclusions above, M³ Consulting is providing the following recommendations to BART. The recommendations contain both race and gender-neutral and race and gender-conscious elements. The recommendations are grouped under the following categories:

- *Croson* Parameters for Recommendations
- Enhancements to Purchasing Procedures and Practices
- Identification of Race/Gender-Conscious Goal Possibilities

These recommendations consist of a listing of pertinent options from which BART may select in narrow tailoring its efforts to the findings of this report. The options combine agency specific and best practices recommendations that are legally defensible in light of the factual findings of this study. BART should consider adoption of those recommendations that are considered most appropriate in terms of cost, resources, likely effectiveness, community acceptance and organizational feasibility.

12.3.1 CROSON PARAMETERS FOR RECOMMENDATIONS

If BART chooses to continue to utilize some form of a race and gender-conscious program, it will need to meet the U.S. Supreme Court requirements of *Richmond v. Croson*. Narrow tailoring is the crucial element in crafting appropriate *Croson* remedies. Courts, have struck down many MWBE programs due to the failure of local jurisdictions to narrowly tailor their remedies. Once a factual predicate has been established, post-*Croson* case law presents several broad guidelines for crafting recommendations for MWBE programs by a public entity, based on the factual predicate findings.

- Race and gender-conscious MWBE programs should be instituted only after, or in conjunction with, race/gender-neutral programs.
- MWBE programs should not be designed as permanent fixtures in a purchasing system without regard to eradicating bias in standard purchasing operations or in private sector contracting. Consequently, each MWBE program should have a sunset provision, as well as provisions for regular review. Additionally, there is the implication that reform of purchasing systems should be undertaken.
- MWBE programs should have graduation provisions for the MWBEs that have largely overcome the effects of discrimination and no longer are in need of a remedy.

- Rigid numerical quotas run a greater risk of being overturned by judicial review than flexible goals.
- Race and gender-conscious goals, if any, should be tied to MWBE availability and to addressing identified discrimination.
- MWBE programs should limit their impact on the rights and operations of third parties.
- MWBE programs should be limited in scope to only those group(s) and firms that suffer the on-going effects of past or present discrimination.

These measures are designed to address the underlying systemic factors that contributed to the disparity in contracting. Procurement adjustments, in particular, are considered by the U.S. Supreme Court as race neutral. The Court requires a public entity to employ race neutral means to the degree available. While the statistical findings suggest that BART can continue to utilize race and gender-conscious goals, the courts may question if BART has aggressively worked to change its own practices, as well as prime contractor practices, to eliminate statistical disparities. A review of the *Croson's* Courts views on this issue is relevant here:

Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. *If MBE's disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation.* The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside.³⁷⁷

Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. *But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification...*³⁷⁸

³⁷⁷ 488 U.S. 469, 508 (1989)

³⁷⁸ *Id.* at 509.

Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding [488 U.S. 469, 510] procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. *Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.*³⁷⁹

(Emphasis added.)

While not controlling for the Ninth Circuit, the Eleventh Circuit summed it up in this manner:

“The first measure every government ought to undertake to eradicate discrimination is to clean its own house and to ensure that its own operations are run on a strictly race- and ethnicity-neutral basis...”³⁸⁰

³⁷⁹ *Id.* at 510-511.

³⁸⁰ 122 F.2d 895, 929 (11th Cir. 1997)

**12.3.2 ENHANCEMENTS TO PROCUREMENT AND DBE, SB and MWBE
PROCEDURES AND PRACTICES**

Below are recommendations to BART for organizational, cultural, structural and programmatic changes that will lead to transformative and sustainable change in BART's procurement operations and that will bring BART into regulatory compliance and alignment with best practices.

A. Change inclusion focus from programmatic (*compliance* with DBE regulations) to organizational (*commitment* to inclusive procurement environment)

Much of the focus at BART has been on DBE goals for its federal race and gender-conscious efforts and good faith efforts for its non-federal Non-Discrimination program. These efforts, while important to the issues of inclusion are programmatic (related to operation of a specific program) and functional (focused on departmental function) in nature, and not focused on organizational and District-wide change. These programmatic efforts do not have a transformative impact on procurement and contracting operations that will lead to real and sustained change in organizational culture and practices as it relates to doing business with DBEs, SBs and MWBEs. Furthermore, the effectiveness of these programmatic efforts will not be maximized until underlying organizational issues impacting the inclusiveness of BART's procurement operations are addressed.

Many of the recommendations below focus on District-wide organizational changes that can lead to the transformation of BART's procurement system to become more inclusive, whether or not BART employs race and gender-conscious or race and gender-neutral programmatic initiatives. When implemented, these recommendations will also enhance the effectiveness of many recent DBE, SB and MWBE programmatic initiatives, such as contracting plans and bonding programs. Lastly, as we noted in Chapter IV: Statistical Methodology, under EEO requirements, employers must be able to "track" its decision-making points—applicants, promotions, terminations, etc. Similarly, BART should be able to "track" its procurement and contracting-related decision-making points in order to more effectively determine if BART's current practices in any way promote active discrimination or other exclusionary practices.

The importance of leadership commitment and organization-wide implementation cannot be under estimated in either a race and gender-conscious or race and gender-neutral environment. Most of BART's major vendors perform work statewide, nationally and/or internationally and are intimately familiar with responding to various public sector inclusion

efforts at the local, state and federal levels. The degree of responsiveness often correlates to the public entity's degree of commitment to inclusion in which these firms are pursuing opportunities.

B. Identify Community Economic Development and Inclusive Procurement Objectives

Building on Recommendation A, BART's Board of Directors has consistently shown a commitment to ensuring that BART's activity promotes economic growth and development in the Region in an equitable manner. In its 2008 Strategic Mission and Values, the Board established that BART should

Provide safe, clean, reliable and customer-friendly regional public transit service that increases mobility and accessibility, *strengthens community and economic prosperity* and helps preserve the Bay Area's environment.³⁸¹
(Emphasis added.)

In its 2015 Strategic Mission and Values, the Board established that BART's vision:

"...supports a sustainable and prosperous Bay Area by connecting communities with seamless mobility."

In doing so, BART established the goal of "Leadership and Partnership in the Region" that has three sub-goals:

- **Economy**—Contribute to the region's global competitiveness and create economic opportunities.
- **Equity**—Provide equitable delivery of transit service, policies, and programs.
- **Environment**—Advance regional sustainability and public health outcomes.

To achieve the Vision, Mission and Goals as established by the Board of Directors, procurement plays a pivotal role, along with proper planning and budgeting, which starts the execution and implementation of the process that actualizes the Board's objectives. The Procurement Department must operate in a manner that is both consistent with the policy objectives established by the Board and programmatically sound. BART can do so through striving toward inclusive procurement, which focuses in an on-going manner on working to ensure that all vendors—regardless of race, ethnicity, gender, national origin, sexual orientation, or disability—have the opportunity to bid and win BART procurement and

³⁸¹ *Ibid.* at p.1.

contracting prime and subcontracting opportunities, thereby participating in the economic prosperity of the Region.

BART's vendor activity should also support the policy objectives of BART and inclusive procurement. Under Proposition 209 on non-federal contracts, BART is not allowed to utilize race and gender-conscious initiatives or establish non-discrimination programs inconsistent with the *Hi-Voltage Wire* case. However, BART is allowed to achieve economic development goals that support the growth and development of the local business community. Programs directed for these objectives will be reviewed by the courts under the "rationally related" test, as opposed to the "strict scrutiny test" or "intermediate scrutiny test" utilized to determine the constitutionality of race and gender-specific initiatives.

As such, on large contracts (threshold to be determined by BART), BART should consider requesting vendors to provide a Socioeconomic or Economic Impact Plan that demonstrates how the vendor's execution of the development project will promote BART's strategic vision, mission and goals. BART can facilitate a vendor's response by developing specific community economic development and inclusive procurement objectives that it believes furthers its commitment to "strengthen community and economic prosperity".

C. Address Decentralized Nature of BART Procurement Process and Impact on DBE, SB and MWBE Participation

M³ Consulting does not advocate for a centralized or decentralized procurement process. We seek to determine the impact of either on the ability of DBEs, SBs and MWBEs to contract with a public entity. Without appropriate infrastructure, management and operational support, an unwieldy bureaucracy can be created that serves as a de facto barrier to DBEs, SBs and MWBEs. As it relates to BART, it appears that BART operates in a decentralized procurement environment that has the overall effect of decreasing accountability and transparency as it relates to DBE, SB and MWBE participation, resulting from lack of robust infrastructure and integration, coordination and delegation. As such, BART should ensure that the Procurement Department has the authority and ability to:

1. Report to the Board of Directors and the General Manager on the manner in which BART's annual procurement spend has assisted BART to achieve its mission to "Provide safe, clean, reliable and customer-friendly regional public transit service that increases mobility and accessibility, *strengthens community and economic prosperity* and helps preserve the Bay Area's environment"; [Emphasis added]
2. Report to the Board of Directors and the General Manager, in conjunction with OCR, on whether and the manner in which BART has met stated DBE targets at both the

prime and subcontractor levels across procurement categories, inclusive of change orders and work plans, as well as other inclusive procurement objectives; and,

3. Make recommendations for the utilization of procurement techniques and contracting vehicles that best meet the Board of Directors' objectives as it relates to community economic development and inclusive procurement, as well as Sponsor Department needs.

While the Procurement Department should have the authority necessary to achieve the recommendations above, based on BART's decentralized system, the Procurement Department will need to work collaboratively with the General Manager, OCR, PDC and M&E, and Capital Budgeting. This group can form the participants in **BART's Inclusive Procurement Committee**, which would be critical to procurement planning, budgeting and forecasting, utilization of appropriate contract vehicles, opportunity identification at prime and subcontractor levels, unbundling, contracting plan and goal-setting. BART can also consider whether representative members of its Business Advisory Council and other Sponsor Departments should be included.

BART's Inclusive Procurement Committee will also be responsible for developing BART's Action Plan in response to the recommendations contained herein.

D. Culture Audit

M³ Consulting recommends that BART conduct a culture audit in order to assist it in moving toward an organizational culture that will more readily support the Board's Vision and Mission, as well as a more inclusive procurement process. The culture audit will allow examination and explanation of the common rules of behavior and underlying beliefs of BART that drives its organization and the way people approach their work. It also will assist in determining whether BART's current organizational culture is an asset or liability in achieving its Vision and Mission and provides actual evidence for establishing the appropriate direction for BART.

As a tool for diversity and inclusion, it identifies sources of diversity tension and leverage points that shape culture. It will provide a precise measure of employee perceptions, recommendations for cultural and system interventions for more effective diversity management to support organizational goals. If bias—implicit or unconscious—is one of the factors significantly impacting BART's organizational and procurement culture, a culture audit will root it out. The benefit of the culture audit is that bias is not isolated, but viewed in conjunction with other factors. Regressions can then be run to determine the degree to which bias is a primary factor.

E. Address Data Capture Issues

Critical to creating an inclusive procurement operation at BART is an efficient and integrated procurement data infrastructure. These data recommendations are necessary because:

- Poor data systems can mask discriminatory actions or disparate impact, even where race and gender-conscious goals are utilized. Immediately addressing data issues is critical to protecting against unfairly discontinuing BART’s DBE programs due to temporary or permanent injunctions or internal decisions based on incomplete data that may allow the organization to continue to discriminate. Sound, accurate and complete data supports the Board of Directors, General Manager and Legal Department in fairly balancing all legal and regulatory implications, potential challenges, etc. arising from BART’s ability to sufficiently state, in this disparity study and any time thereafter, the level of DBE, SB and MWBE participation in its procurement and contracting activity.
 - We note that in the EEO environment, under 29 CFR Ch. XIV, Part 1607.4.D, a finding of an inference of adverse impact can be drawn from poorly maintained data system not in conformance with data tracking requirements of the regulations. While 49 CFR Part 26 does not have similar language, Section 26.47 covers Bad Faith Administration of the DBE Program.
- More refined and detailed procurement spend analysis cannot be performed without better data capture and tracking. This inability limits programmatic activity, including expansion of the pool of actually available firms through outreach; setting project-based goals; determining participation at the commodity code level; and tracking decision-making issues at bidding, evaluation, awards and commitments, and post-award utilization.
- To operate a race and gender-neutral procurement operation, consistent with Proposition 209, BART must be able to adequately track levels of SB and MWBE participation in order to anticipate necessary adjustments. Further, under a race and gender-conscious DBE program, tracking allows for proactive and real-time responses that allow BART to utilize race/gender-conscious programs when necessary, and to respond quickly when tracking reveals that participation is dropping in a race and gender-neutral environment.
- Data efficiency promotes BART’s ability to quickly and nimbly respond to DBE opportunities and challenges, such that it does not unnecessarily and perhaps unintentionally perpetuate “government inertia” referenced by Justice Sandra Day O’Connor in the *Croson* decision.

M³ Consulting recommends that BART address the following data issues outlined below to support transparent monitoring, tracking and reporting. Once these changes are

implemented, M³ Consulting recommends that BART update the statistical portion of the disparity study to capture FY 2015 through FY 2017 data to provide both a more accurate reflection of DBE, SB and MWBE utilization at prime and subcontractor levels and as a test case for its DBE, SB and MWBE data capture process.

1. **Expand data capture on vendor portal**—BART should require all firms interested in doing business with BART to register through its new online vendor portal, including certified DBEs, SBs and MWBEs to which BART has identified from outreach and matchmaking efforts. The vendor portal captures both NAIC code and vendor contract size preference. FTA requires BART to capture annual gross receipts and age of firm on all bidders and subbidders. By capturing both sets of information for all vendors, BART now has capacity data that can be utilized, as it solicits vendors for both quotes and bids. In other words, BART has the *rudimentary* information need to transition vendors from simply “ready and willing” to “ready, willing and able.”

Additionally, BART should consider requesting from vendors both NAIC code and commodity code (UNSPSC or NIGP Codes), in order to create connectivity across databases (vendor and DBE lists utilize NAIC codes; however, procurement and accounts payable activity relies on commodity code). BART can facilitate this process with the NAIC and/or NIGP’s cross walk programmed into its vendor portal, if allowable under licensing agreements. Lastly, BART should consider the best means of uploading certified DBEs, SBs and MWBEs into the vendor portal, such that project availability and project/contract-based goals can be established real-time and inclusive notifications, solicitations and outreach can easily occur within the legal confines of Proposition 209 and 49 CFR Part 26.

2. **Assign commodity codes to bids**—By assigning commodity code to bids or quotes, BART will increase the accuracy of commodity code tracking, which is essential to reporting DBE, SB and MWBE participation in specific areas. Further, prime bidders should assign commodity codes to their sub-bids. BART should also consider reporting by commodity code, in addition to NAICs code. Commodity codes are product-specific; NAIC codes are industry-specific. NAIC codes do not always sufficiently address the product-specific needs of procurement agents, particularly in the area of planning. M³ Consulting recommends utilizing the coding system established by National Institute of Governmental Purchasing for two reasons:
 - a. The coding system is designed specifically for public sector procurement operations; and,
 - b. Licensed members of NIGP have access to their crosswalk to both NAIC codes and UNSPSC codes. This crosswalk will be useful to BART for disparity study analysis and DBE goal setting, as BART will not rely on different consultants

to change procurement decisions on the use of commodity codes to NAIC codes, purely for the purposes of the disparity study.

M³ Consulting further recommends that BART pre-assign a Procurement Category to the commodity codes in one of five categories:

- Architectural, Engineering and Other Design and Construction-Related Professional Services;
- Construction;
- Professional Services;
- Technical or Non-professional Services;
- Procurement.

BART should also determine the appropriateness of assigning multiple commodity codes under a contract ID with a particular procurement type assignment, as is the current best practice. For example, under an On-call contract, the procurement type may be Architectural, Engineering and Other Design and Construction-Related Professional Services, however, based on the work plan, the commodity code assigned may fall under any of the five procurement types. For this disparity study, in order to accurately reflect procurement activity, the Procurement Department overrode procurement types assigned based on the UNSPSC codes in the PeopleSoft database with the procurement types assigned to the Contract ID on the 275 formal procurements on the Procurement Department's Procurement List. The UNSPSC code was utilized to identify Procurement type for all other transactions in PeopleSoft, beyond the 275 formal contracts.

- 3. Consider utilizing e-procurement or online bid portal to capture bid and quote information**—Several on-line programs allow for the on-line solicitation of quotes and bid (not simply filing pdfs). Proposals can also be uploaded. This process reduces workloads, while at the same time increasing detailed information available to BART on both bids and quotes. These programs should integrate with PeopleSoft systems. Any bid portal chosen should have the capacity to be programmed to meet the requirements of FTA on bidder and sub-bidder tracking (see 49 CFR Part 26.11) and allow confirmation of prime vendor conformance with California Public Code 4100-4114, Subletting and Subcontracting Fair Practices Act.
 - a. The Bid Portal should also allow prime vendor access to upload bids/bid tabulations for sub-bid opportunities the prime vendor is letting on a BART contract. Not only will this facilitate compliance with 49 CFR Part 26.11, it will also facilitate Good Faith Efforts determinations under BART's

Race/Gender-Neutral Non-Discrimination program, allowable under Proposition 209.

- b. OCR will need to determine the impact of using the online portal on small businesses who may not be familiar with the technology; training programs and access to technical assistance providers for assistance should be made available to the degree necessary to minimize any negative impact.
- 4. Employ Enterprise Resource Planning (ERP) systems that offer Integrated Procurement, Project Management, and Payments data modules**—BART does not utilize the procurement and project management modules of PeopleSoft. As such, the Procurement Department, Sponsor Departments and OCR utilize various Excel and Access databases to meet their needs. These databases are not integrated with PeopleSoft, thus making seamless tracking and monitoring difficult. BART should review its ERP systems to determine how best to create a fully integrated data system that meets the needs of multiple departments with different functions.
 - 5. Consider utilizing an off-the-shelf DBE, SB and MWBE tracking system**—BART should consider utilizing an off-the-shelf DBE, SB and MWBE tracking system *if* BART's vendor, new bidder portals and current financial management systems cannot address OCR's tracking needs. The tracking system should facilitate easy retrieval of data by OCR from other systems utilized by BART, *not replace* changes necessary to vendor, bid, project management and payment systems. Several off-the-shelf software packages have been developed for DBE, SB and MWBE tracking, monitoring and reporting. These systems should integrate with PeopleSoft, BART's vendor portal and BART's chosen bid portal—to the degree that current systems can be maximized. This tracking system should also have the capacity to track formal joint venture and mentor-protégé agreements. Further, this system should have the capacity to track awards, commitments at point of contract execution and payments at both the prime and subcontractor level.
 - 6. Develop computerized formats for evaluation score sheets**—BART should digitalize its evaluation score sheets, such that BART is positioned to determine that these evaluations are scored in a fair and non-discriminatory manner and that the decision-making process is transparent. By digitalizing evaluation score sheets, BART is also able to assess the fairness of its selection process over time.
 - 7. Track awards, commitments and payments separately**—Decisions made at the point of award can change before a contract is executed or after contract execution, due to change orders and other contractual adjustments. As such, BART should ensure that

it has the ability to track awards and commitments separately, as well as payments, at both the prime and subcontractor level. This detailed tracking also allows BART to ensure that any changes to agreements between BART and its prime and subcontractors and vendors is executed in a non-discriminatory fashion. This level of tracking also allows BART to address anecdotal concerns from both BART staff and the general community regarding subcontractor substitutions. We note that the IDIQ cost plus contract vehicles utilized by BART on A&E contracts complicates tracking of awards and commitments in this area. Recommendations regarding this contract vehicle is discuss in Recommendation G.

- a. Given the size and contract duration of many of BART's A&E and Construction projects, BART should be able to report on commitments at prime and subcontractor level, as well as payments. Awards are determined from bids submitted. Commitments reflect total utilization based upon the original contract amounts, change orders and work plans, as reflected in signed and executed contractually binding agreements. Payments may overstate or understate DBE, SB and MWBE utilization on open contracts, based on project scheduling.
- b. In developing this tracking process, BART should ensure that there are common identifiers, i.e. vendor numbers, vendor tax-ID, project numbers, agreement numbers, that facilitate easy tracking of individual vendors, as well as projects from the point of requisition and solicitation to project close-out.
- c. As BART determines project management systems that are part of a fully integrated data system, BART should also consider requesting vendor invoices in both PDF and spreadsheet formats to allow BART project managers and resident engineers to upload detailed commitment and payment information into any chosen software.

By being able to track these areas separately at the prime and subcontractor level, BART is positioned to determine areas where closer scrutiny and deeper dives into its decision-making processes and those of its prime vendors are required to ensure that these decisions are being made in a non-discriminatory manner.

8. **Appropriate access**—As suggested by one BART official, having a dashboard would be very useful in ensuring staff's ability to respond real-time to DBE, SB and MWBE participation. As BART accesses appropriate systems and software packages to utilize, BART decision makers should be sure that these systems accommodate appropriate access by staff in procurement, finance, OCR and Sponsor Departments.

F. Budgeting, Forecasting and Scheduling

On an annual basis, BART should develop a budgeting and forecasting process appropriate for each procurement category that provides project information necessary for planning its activities as it relates to DBE, SB and MWBE participation. Master schedules should also be available. From these sources, BART is able to make transparent:

- Type of possible opportunities at prime and subcontractor levels, as well as formal and informal levels;
- Funding source; and,
- Timeframe that opportunity may be available.

With this information, BART can begin to (a) project the impact of BART's purchases on economic, business and employment growth in the Bay Area, (b) Conduct matchmaking, and (c) Identify areas where local capacity is needed among both DBEs, SBs and MWBEs and non-DBE, SB and MWBE firms and begin pre-bid capacity building efforts.

G. Contracting Vehicles

The types of contracting vehicles utilized by BART and the degree to which they are utilized can impact the level of DBE, SB and MWBE participation pre-and post-award. Mostly, BART relies on definite quantity contracts. Decision points are easy to track on definite quantity contracts, *as long as the data recommendations outlined above are addressed (See Recommendations E).*

However, PDC relies heavily on indefinite quantity contracts on a cost-plus basis. These contracts make awards and commitments difficult to track for several reasons:

- The award is a not-to-exceed budget number;
- The commitment reflects an actual work plan cut against the award. The commitment is also considered a budget amount, even though hourly rates, team members and budget has been established against a specific scope of work; and,
- Payment can exceed or be less than the commitment amount, because the commitment is also considered to be a budget. Based on interviews, for the most part, the budget is maintained.

Staff identified the issues associated with managing these Indefinite Quantity Contracts on a cost plus fixed fee base (IDIQs), typically of \$15 million or greater, with expanded and unwieldy scope coverage that includes definite quantity contracting opportunities that can

be met by smaller firms. These IDIQs are called “On-call contracts” by BART. We will continue to reference them as IDIQs in these recommendations to ensure focus on the essential issue that On-calls create for DBE, SB and MWBE participation—their indefinite quantity characteristic.

BART should review its usage of IDIQs to determine:

- Whether IDIQs are the best contract vehicle for achieving BART’s policy, procurement and project objectives in A&E;
- Whether definite quantity contracts can be separated out of the larger IDIQ and bid separately;
- Whether definite quantity work plans can be established under the IDIQ and whether the procurement department’s involvement in the execution of work plans should be greater than serving in a primarily administrative function; Whether OCR should sign off on DBE participation on work plans;
- Whether a work plan (for which a legally binding PO is issued) should be considered a definite quantity agreement;
- Whether other management tools, such as rotating lists of firms, can be employed to allow greater expectation in actual vendor utilization outcomes on IDIQs; and,
- Whether small business set-aside programs can be established under the IDIQ, particularly for the definite quantity items.

As long as BART continues to utilize this contracting vehicle to the degree that it does and in the manner that it does, then planning, monitoring and tracking DBE, SB and MWBE participation in these opportunities will be challenging.

The IDIQs covers both A&E and Construction Management contracts. Interestingly, in the teaming arrangements there was no common tool utilized by large prime vendors around the country to meet DBE, SB and MWBE participation goals—that is a DBE, SB and MWBE partner largely responsible for tracking, monitoring and reporting on DBE, SB and MWBE participation on the particular project(s) for which the Construction Manager or Architect is responsible. This activity could fall into the Program Management and Administrative Cost (PMAC) allowable under On-call contracts.

H. Monitor Contracts for Issue of Concentration

BART should continuously review its contracts to ensure that (1) the same Non-DBE, SB and MWBEs are not securing a significant percentage of BART contracts and that (2) the same DBEs, SBs and MWBEs are not accounting for a significant percent of BART DBE, SB and MWBE participation.

To meet the requirements of 49 CFR Part 26.33, BART should monitor its contracts to ensure that DBEs are not overly concentrated in certain product areas as a means of BART meeting its DBE goals.

Concentration can be addressed in the following ways:

- Ensure that there is no steering of contracts at the prime or subcontractor levels;
- Expand pool of available firms;
- Expand capacity of available firms; and,
- Ensure that firms repeatedly submitting low bids are not requesting change orders post award or providing substandard work.

I. Promoting DBE, SB and MWBE Participation at the Prime Contractor Level

To ensure that the responsibility for DBE, SB and MWBE participation is shared by *both* BART and its prime vendors, BART should take steps to ensure that DBEs, SBs and MWBEs are involved in BART's procurement opportunities at the prime levels. Below is a listing of those efforts that BART can undertake:

- Identify prime-level procurement opportunities where a significant pool of DBEs, SBs and MWBEs are available;
- Establish prime-level participation targets to ensure that BART is focused on securing participation at the prime level, as well as subcontracting level (federal only);
- Improve procurement forecasting to allow for inclusive planning and outreach (see also Recommendation F.);
- Utilize race/gender-conscious initiatives, such as goals, evaluation factors, joint venture incentives, price preferences, targeted solicitation (federal only);
- Increase the utilization of SB set-asides and sheltered market opportunities, where SB availability supports doing so;
- Provide notice of small business opportunities (below \$10,000 for construction and below \$100,000 for other procurement categories) and ensure that DBEs, SBs and MWBEs are included in pool of firms being solicited;
- Consistently review pool of DBE, SB and MWBE sub-bidders and subcontractors to determine those that have done a significant level of subcontracting with BART and/or other public agencies, thereby building a track record to support prime level awards;

- Utilize bid rotation on IDIQs;
- Unbundle contracts into commercially viable units;
- Optimize joint ventures, develop and encourage mentor/protégé program, recognize prime opportunities for distributors (see also Recommendation N.);
- Review and revise all technical specifications to exclude proprietary language that discourage DBEs, SBs and MWBEs from bidding; and,
- Develop evaluation mechanisms for measuring BART senior management commitment and staff's efforts toward DBE, SB and MWBE participation in BART contracting opportunities.

J. Develop DBE, SB and MWBE Program Which Addresses Requirements of Large Construction and Development Projects

BART construction and development projects are often larger than those developed by other public sector agencies. This reality has led to a project-based decision-making environment at BART. As such, a project-based planning and procurement approach is needed to match BART's operational requirements. From the perspective of DBE, SB and MWBE participation, BART's General Manager has recognized this project-based environment and instituted the Contracting Plans to support project-based goals. Its effectiveness, however, is minimized because the procurement process itself for these large developments is not project-based. Utilizing the Seven Phases of a Development ProjectSM defined by M³ Consulting will allow BART to meet its planning, procurement and DBE, SB and MWBE needs across the life cycle of the development project.

The Seven Phases of a Development ProjectSM, along with possible opportunities (list intended to provide examples, not be exhaustive) at each stage are:

- **Planning**—opportunities exist in the acquisition of right-a-way; acquisition of property; legal services; environmental studies; land use studies; geotechnical studies and feasibility studies.
- **Financing**—opportunities may include investment banking, lobbyists, grant proposers, and legal services.
- **Designing**—design services include both architectural and engineering services, with other additional services that may be required such as geotechnical services, and environmental services. Design services may also include the development of a bulk

purchasing plan. Construction management services would also be included here, based on California Public Code.

- **Constructing**—these services include prime contractor/subcontractor activities including general contractors, tradesmen and soil testing.
- **Equipping**—involves the furnishing of facilities and buildings.
- **Maintaining**—involves the maintenance of equipment, facilities and buildings.
- **Operating**—covers the provision of those services that contribute to the overall continued function of the facility and buildings.

When DBE, SB and MWBE participation is viewed within the construct of the phases of a development project, unbundling becomes a natural part of the project planning process. It also becomes apparent, that in the BART environment, to plan extensively and inclusively requires a collaboration between the General Manager's Office, Procurement, OCR, PDC and M&E (see also Recommendation C.).

K. Request Clarification of Public Code 4100

The State of California has recognized discriminatory and exclusionary practices by prime contractors in the construction industry and established a strong and aggressive code to promote fairness in subcontracting under Public Code 4100. BART's strict compliance with and enforcement of the Public Code is a vital tool provided by the State for ensuring that BART and other California public agencies are not participating as *a passive participant in private sector or marketplace discrimination in the construction industry*. BART should ensure that it is utilizing Public Code 4100 to the fullest extent possible by seeking verification from prime contractors that they have met the code's requirements as it relates to:

1. Substitution and subletting;
2. Advertisement and notification of subcontractor bonding requirements; and,
3. Not using any other means to facilitate bid shopping and bid peddling.

However, the Code appears to apply to construction contracts only, based on the language of the code and has been interpreted by BART's legal counsel and procurement staff as such. BART should work to ensure that similar procedural, legislative and statutory support for modern construction techniques utilized under A&E, Construction Management, Design-Build, and Other Design and Construction-Related Professional Services are identified or

developed. In doing so, the General Manager and the Legal Department will be in a position to provide the Procurement Department and Sponsor Department with detailed written instructions that addresses all issues related to subcontractor/subconsultant substitutions.

Further, BART should further investigate anecdotal comments suggesting unfair or illegal subcontractor substitutions to determine whether there is a violation of Public Contract code 4100 on BART contracts.

L. Increase Small Business Set-Asides and Sheltered Market Projects

BART staff noted that it has had limited success with its small business set-asides and sheltered market projects. Consistency, transparency and accessibility are key issues impacting BART's success. Several recommendations above should assist BART in increasing the success of its small business set-aside programs. BART should:

- Consistently establish DBE goals, with anticipated race/neutral portion on federal projects and small business set-asides, goals and sheltered market projects on non-federal projects.
- Forecast and publish annually list of anticipated small business purchases on website, based on current and historical purchases to minimize small business need to consistently check for upcoming bids;
- Ensure that small businesses are registering on the vendor portal. This should also facilitate buyers' ability to quickly connect with small vendors on informal purchase opportunities;
- Ensure that BART has strong relationships with MT&A providers who are in constant communication with DBEs, SBs and MWBEs;
- Provide notice of small business opportunities on its website;
- Allow for online submission of quotes and bids;
- Work collaboratively with and provide incentive to (where allowable) prime vendors to refer small business capable of performing small prime contracting opportunities;

M. Bonding and Insurance Program Related to Project-Based Procurement Process

BART recently attempted to implement a bonding and insurance support program. The program was cancelled due to non-participation. BART should consider re-constituting this initiative in collaboration with an appropriate existing race neutral provider identified in

Chapter XI to provide these services on an as-needed basis. By so doing, BART can develop an initiative that:

- Takes advantage of the race neutral provider(s) stated objective, experience and continuous outreach with the target population; and,
- Minimizes BART's financial and administrative requirements.

Bonding

Four approaches may be taken to remove the barrier that bonding requirements sometimes can represent. *The efficacy of these programs must be reviewed in light of bonding requirements from the State of California.* The approaches include waiving bonding requirements, removing customary bonding stipulations at the subcontract level, reducing bonding, and phasing bonding. Each is described below:

- *Waiving bonding requirements.* While bonding may be required by local, state, or federal statute in particular instances, all governmental entities have some latitude in requiring a bond in the first place. Typically, small dollar value contracts are not required to have bonds. An honest assessment of the actual risk involved to the owner ought to be performed before deciding to always require a bond on every job. In addition, bonds can be required within a certain number of days after bid submittal, rather than with the bid submittal, so that only low bidders, and not unsuccessful bidders, must obtain them.
- *Removing bonding stipulations at subcontract level.* Typically, on larger construction jobs, the owner requires bonds of the prime contractor. This means, essentially, that the total job is bonded. The practice of requiring bonds of subcontractors is just that, a practice. It is not required by the owner. Therefore, the owner may develop a policy that does not permit a prime's requirement of a subcontract bond to constitute a barrier to DBE, SB and MWBE participation. Both the owner and the prime contractor should be willing to undertake special activities to monitor subcontractors' performance and lend technical assistance, if necessary. Subcontractor bonding requirements should be viewed in light of the discretion provided BART under 49 CFR Part 26 and the prime contractor requirements regarding subcontractor bonding under State of California Public Contract Code 4100-4114.
- *Reducing bonding.* Rather than requiring a 100 percent payment and performance bond, consideration also can be given to reducing the dollar coverage of the bond. A 50 percent bond, for example, can be required, thus reducing the size and cost of bonding. In this way, a company's bonding capacity is not reached so quickly and bonding is

made more affordable. The owner benefits by still being protected by a bond and in the form of lower bids since the cost of bonding is built in to contractor's bids.

- *Phasing bonding.* This technique can be used in instances where bonding cannot be waived but where there are limitations of the low bidder to obtain a full bond. For example, the owner can divide the job into three phases, each requiring a separate notice to proceed. The successful bidder is then required to obtain a bond for each phase. Upon completion of the first phase of the work, the bond is released and the contractor is required to provide a second bond in a like amount. This process is then repeated for a third time. The owner thereby accommodates a DBE, SB or MWBE firm that might not otherwise qualify, the owner is still protected from risks, and the contractor builds a track record of completing work under three bonds, thereby building bonding capacity and lowering the cost of bonding.

In addition to the above, several governmental bodies across the country have worked with local banking and other financial institutions to create bonding programs underwritten by the local government. A key to the success of such programs is establishing a contractor performance monitoring function to provide an early warning to any problems being encountered by covered contractors. The monitors are empowered to mobilize necessary assistance to ensure completion of the work and to minimize financial and other risk to the underwriter.

Wrap-Up Insurance

This represents an approach to affording all contractors the necessary insurance to perform public work, while guaranteeing the owner that needed insurance coverage is in place in all critical areas of contracting. Under a wrap-up insurance plan, the owner establishes a subsidiary organization, usually made up of a consortium of insurance brokers. Insurers are normally eager to compete for this business, and will offer competitive rates to secure it. The arrangement also represents an excellent opportunity to involve DBEs, SBs and MWBEs in this business. Once in place, the owner offers blanket insurance coverage to all of its contractors through the wrap-up program.

N. Joint Ventures, Mentor-Protégé Programs, and Distributorships

BART should develop specific procedures for verifying, counting and tracking the participation of DBEs, SBs and MWBEs in:

- Joint Ventures
- Mentor-Protégé

- Distributorships

OCR should review and sign off on any teaming arrangements, where the team anticipates receiving DBE, SB and MWBE participation credit. While FTA and FHWA have not developed advisory documents that discuss the manner in which joint venture agreements should be constructed, FAA has, because of the complex concessions agreements that often involve joint ventures. BART may look to FAA advisory documents available on-line for guidance.

O. Effective Matchmaking and Outreach Programs

Matchmaking

Matchmaking is fundamental to a successful inclusive procurement program, whether race/gender-conscious or race/gender-neutral. Central to matchmaking is advance notice of the universe of upcoming contracting opportunities, as determined during forecasting, budgeting and scheduling.

Currently, BART has taken some steps toward matchmaking through its pre-bid matching sessions. However, a full matchmaking process has not been implemented. Matchmaking programs must be tailored to the dynamics of a particular procurement operation. We emphasize that the matchmaking session is not for the purpose of steering vendors to buyers. BART purchasing and OCR personnel will be required to have detailed knowledge of the capabilities of certified DBEs, SBs and MWBEs in order to fully maximize the matchmaking process. The matchmaking session can include only DBEs, SBs and MWBEs, non-DBE, SB and MWBE firms or both. The matching sessions should include the following:

- Coordinate matchmaking sessions with forecast release and/or solicitation schedule. In many instances, matchmaking sessions follow pre-bid conferences. Matchmaking sessions can also be utilized to identify available firms for particular projects in planning stages. While not called matching sessions, the federal government often allows vendors to provide qualification information in pre-bid research to determine the level of competitiveness it can expect once the bid is let.
- Focus on particular commodity areas in the five procurement categories, such that vendors specializing in particular goods and services will have the opportunity to meet with buyers responsible for those commodities.
- Buyers and contract specialists should have the procurement projections such that they can discuss specific upcoming opportunities and the requirements and procurement mechanisms that will be utilized to procure the good or service. This

specificity is the key factor that distinguishes matchmaking sessions from outreach and vendor fairs.

- Identify informal and formal opportunities during the matching session so that vendors can determine where they have the greatest likelihood of successfully marketing to BART.

Matchmaking at the subcontractor level. Matchmaking takes on a team building dynamic at this level. Prime contractors/consultants have the opportunity to identify potential DBE, SB and MWBE team members on upcoming opportunities to be let by BART. To be most effective, BART personnel will be required to have an in-depth knowledge of the capabilities of the pool of certified DBEs, SBs and MWBEs. OCR staff also need to have strong business development skills. *The matchmaking session* should focus on a particular project, either in planning or prior to bid. It is critical for success that matchmaking occur as early in the planning process as possible. Prime contractors, construction managers and large consultants' planning process begin well in advance of the actual Invitation to Bid or Request for Proposal.³⁸² As such, at the time of bid letting, prime contractors and contract managers have often already identified team members to address commercially viable opportunities at the subcontractor level that build a firm's capacity and portfolio. Conformance to DBE, SB and MWBE requirements often times does not produce quality and high level DBE, SB and MWBE participation, because these firms are an "appendage" to the team already developed.

In addition to establishing matchmaking initiatives planned around BART's Capital Budgets, BART's legal counsel should consider the legality of including responsiveness to matchmaking efforts as a factor of good-faith under both 49 CFR Part 26 and BART's Non-Discrimination Program. Anecdotal interviews suggest that, while prime vendors attend BART-sponsored matchmaking session, prime vendors do not communicate with or make themselves available to DBEs, SBs and MWBEs after the session, thus opportunities for these groups do not often materialize as a result.

Outreach

BART's outreach efforts must conform to Proposition 209 which allows for "inclusive" outreach, as opposed to "targeted" outreach. BART should thus focus its outreach efforts on expanding the total vendor and bidder pools to include potentially available firms from

³⁸²Some government online bid and marketing portals employ staff that is in constant contact with government procurement agents and planning departments to identify projects for its clients that may be in the initial planning stages and not yet included in procurement forecasts and budgets. Member in these portals can cost \$10,000 or more.

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sources, such as other agency certified lists and Dun & Bradstreet (D&B) lists. These firms would have to meet BART's certification requirements to be counted toward BART's goal-based program targets. Furthermore, the inclusive outreach should pay special attention to ensuring that firms actually capable of bidding on informal contracts, small contracts and sheltered market opportunities are included in the vendor/bidder pool.

P. Monitoring and Tracking Reports -- Overall and Project-by-Project

As suggested previously under Recommendation A., BART should always be able to determine that procurement and contracting decision-making is executed in a non-discriminatory manner. We believe it is useful to view RWASM tracking from the standpoint of statistical data supporting applicant flow and compliant reporting:

| EEO Applicant Flow | RWA SM and Disparity Analysis Equivalent |
|----------------------|--|
| Labor Force | Potential Availability from D&B Firms, Firms Receiving Building Permits and/or Business License, certified DBE, SB and MWBE firms, non-certified DBE, SB and MWBE firms, trade organization membership; yellow pages |
| Potential Applicants | Registered Vendors, Plan Holders, Pre-Qualified Vendors |
| Actual Applicants | Bidders and Sub-bidders (inclusive of quotes) |
| Actual Hires | Awardees and Payees |
| Actual Promotions | Difference between prime and subcontracting opportunities; vendor performance |
| Actual Terminations | Contract terminations, for convenience and for cause; substitutions |

Source: M³ Consulting

In annual reporting on the achievement of DBE, SB and MWBE efforts to the Board of Directors, Procurement and OCR's reports should also include the degree to which BART's efforts have:

- Promoted and strengthened economic prosperity in the Bay area;
- Enhanced competition;
- Expanded business capacity; and,
- Removed barriers and reduced or eliminated disparities.

Q. Post-Award Compliance Responsibilities

Based on BART's Resident Engineer Manual, resident engineers have responsibility for monitoring and reporting on the following:

- Fair Employment Practices
- Apprentice Certificates
- MBE, WBE, DBE or SB Participation
 - Monthly MBE/WBE/DBE or SB Participation
 - Final MBE/WBE/DBE or SB Participation
- Labor Deficiencies

BART should review the degree to which resident engineers are performing these functions and sync these requirements with those of OCR, such that resident engineers are performing these functions in a manner that meets the reporting requirements for which OCR is responsible. Post-award utilization responsibilities should minimally include:

- Confirming utilization of DBE, SB and MWBE subcontractors listed on prime contractor's winning bid and executed contract through compliance monitoring, on-site monitoring and reporting;
- While reviewing invoices, confirming that DBE, SB and MWBE subcontractors are receiving timely payments; upload spreadsheet invoice data into appropriate tracking software;
- Confirming BART and prime contractor compliance with Public Code 4100, if subcontractor opportunities are being bid, post-prime contractor award or amount determined under work plans; and
- In conjunction with Procurement and OCR, confirming that the prime contractor's sub-bidding process meets BART's strategic mission and objectives, the requirements of 49 CFR Part 26 and Public Code 4100, on any sub opportunities let by a construction manager, architect or construction firm, post prime award.

R. Partnerships with Technical Assistance Providers

Partnering with existing technical assistance providers for capacity building should not simply be focused on bonding and insurance. BART should develop a process of referral to the appropriate technical assistance provider and follow-up for potential DBEs, SBs and MWBEs who could bid on BART's contracts with some assistance. A firm assessment tool should be developed to determine firms that are:

- Start-up
- Emerging
- Mature

By developing a full technical assistance program and utilizing existing service providers with expertise in different areas, BART should be able to maximize its dollars, while providing technical assistance that can lead to increased contracts on BART opportunities at the informal and formal prime levels, in SB sheltered market contracts and as subcontractors. Working collaboratively allows BART to focus on its core strategic mission and objective, while providing DBEs, SBs and MWBEs the support that they need.

S. Working Capital Loans and Paymaster³⁸³ Programs + Prompt Pay Requirements

49 CFR Part 26.29 requires the establishment of prompt payment measures by BART and its prime vendors on federal contracts. OCR should work with accounts payable, PDC and M&E to ensure that BART and its prime vendors are paying vendors within the requirements of 49 CFR Part 26. To the extent allowable, BART should extend this requirement to non-federal contracts.

Staff noted that a hindrance to DBEs, SBs and MWBEs success on BART projects is the management and financial systems infrastructure requirement. BART should consider working with minority-owned banks and financial assistance providers to serve as paymasters for small qualifying firms. This should provide BART with assurances that financial management issues will not negatively impact contractor performance. BART may also work with these financial institutions to develop working capital loan programs on executed contracts. Working with a paymaster that is a banking institution may also strengthen the DBEs, SBs and MWBEs ability to obtain loans and lines of credit. When financial assistance providers serve as the paymaster, they often become a spoke

³⁸³ A paymaster is authorized by the firm to handle the firm's receipts and payment of expenses, including payroll and subcontractor payments.

persons/intermediary for the small businesses to work through discriminatory or exclusionary banking practices.

12.4 IDENTIFICATION OF RACE and GENDER-CONSCIOUS GOAL POSSIBILITIES

The actual setting of legally defensible DBE goals is a policy decision that requires action by BART. BART can establish overall DBE policy goals that then may be used by employees with buying authority. BART can then develop an action plan that specifies procedure, program and goal improvements that will be made and the timeline allocated for those tasks.

12.4.1 Establishment of Race and Gender Conscious Goals

The existence of established goals is an effective mechanism for establishing objectives for BART and in achieving the desired outcome, when effectively implemented. If operations are inflexible, it falls into a quota. The annual goal should be utilized by BART to periodically evaluate the effectiveness of its program and its project-specific efforts, as well as to gauge whether it is appropriate to increase or decrease the mix of more aggressive remedies. In order to be legally defensible, the annual goal should be a *minimum achievable standard* for DBE inclusion and not a maximum barometer of exclusion.

In certain categories and for certain groups, race/gender-conscious means are supportable activities toward the achievement of established goals, based on the findings of statistically significant disparity. These categories are repeated here for convenience and include:

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Table 12.2
Categories for Race/Ethnicity/Gender-Conscious Means of Addressing Disparity
By Procurement Type
By Federal/Non-Federal

| Procurement Areas | Overall | Federal | Non-Federal |
|------------------------------|---|---|---|
| A&E | <ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females |
| Construction | <ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females |
| Professional Services | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • Asian Americans • Hispanic Americans • Caucasian Females |
| Other Services | <ul style="list-style-type: none"> • African Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Caucasian Females | <ul style="list-style-type: none"> • Hispanic Americans • Caucasian Females |
| Procurement | <ul style="list-style-type: none"> • African Americans • Asian Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Asian Americans • Hispanic Americans • Caucasian Females | <ul style="list-style-type: none"> • African Americans • Asian Americans • Caucasian Females |

Source: M³ Consulting

As significant disparity is eliminated in the above categories, the utilization of race and gender-neutral means in attaining the established goals should be increased. However, in all instances where race and gender-neutral means are utilized, if significant disparity re-emerges, then race and gender-conscious techniques can be utilized on a non-permanent basis to correct identified disparities. Given the recommendations regarding data capture, these categories should be closely monitored, as BART implements the recommendations above, which may result in changes in disparity findings.

Race and gender-neutral means should be utilized primarily for:

| Table 12.3 | | | |
|---|---|---|--|
| Categories for Race/Ethnicity/Gender-Neutral Means | | | |
| By Procurement Type | | | |
| By Federal/Non-Federal | | | |
| Procurement Areas | Overall | Federal | Non-Federal |
| A&E | • Asian Americans | • African Americans | • Asian Americans |
| Construction | • None | • Asian Americans | • None |
| Professional Services | • African Americans | • African Americans | • African Americans |
| Other Services | • Asian Americans • Hispanic Americans | • Asian Americans • Hispanic Americans | • African Americans • Asian Americans |
| Procurement | • Hispanic Americans | • None | • Hispanic Americans |

Source: M² Consulting

While BART should utilize race and gender-neutral means to address participation of the above groups, that does not mean or condone passive or no outreach to these groups, as significant underutilization can emerge or re-emerge with lack of focus by BART to be inclusive.

12.4.2 GOAL-SETTING FORMULAS AND TECHNIQUES

BART has at its disposal a wide-array of goal-setting formulas and techniques, including:

- Bid Preferences
- DBE Goals
- SBE Set-Asides
- DBE evaluation factors

The actual setting of race and gender-conscious or race and gender-neutral goals is a policy decision that requires action by the Board of Directors. The Board of Directors can establish overall annual policy goals by industry. Project-by-project goals could then be established by staff based upon the relative DBE, SB and MWBE availability for performance of the specific contract. This type of goal-setting would probably be considered the most legally defensible flexible form of goal setting available to BART.

M³ Consulting adds to this list of offerings its own goal-setting formula, which is described below.

A. ATMSM Formula

The Annual Target Method (ATMSM) formula, developed exclusively by M³ Consulting, allows entities to develop goals based on both market conditions (availability) and actual levels of participation by BART (utilization). The ATMSM formula also allows BART to forecast the necessary DBE participation levels to achieve the desired outcome, correcting for stated disparity, by an established date. This methodology has been designed to assist BART to determine its goals through a realistic and statistically valid model.³⁸⁴

To ensure that goals properly reflect the opportunity being bid and that goals do not appear to be set-asides because the same goal for a procurement category is applied to every trade or commodity area within that procurement category, M³ Consulting recommends that BART implement project-by-project goals. The ATMSM formula can still be used, but availability should be computed for each project type and then that availability measure used in the ATMSM formula. To calculate availability by project-type, BART must have a well-functioning Central Bidder Registry or Vendor List.

In the ATMSM formula, *G_p* or the target goal is either availability, weighted availability or a goal established above availability. When calculating the project goal using the ATMSM formula, the project goals become a function of correcting disparity and bringing overall utilization in line with overall availability for a particular procurement category. As such, the project goal will reflect the volume of dollars in a particular trade, commodity or project area and, thus, calculate its appropriate weight in assisting in correcting overall disparity.

The calculation of ATMSM is a two-step process:

1. A weighted availability measure is developed by using Sum of the Year's Digits method which results in a higher amount of weight being given to an availability measure which is ranked higher or deemed more reliable or important than other weighted availability used to calculate an average. The following formula: $\{N*(N + 1)\}/2$, will calculate the sum of the number of availability measures being averaged.

³⁸⁴ ATM operates most realistically for an organization over time. The ATM is designed to correct for any disparity found. As such, established goals will be higher than availability, if disparity exists. Thus, if an organization attempts to correct for this disparity in a very short period of time, the goal calculations will result in very high numerical percentages. Actual calculations would be based on specific availability and utilization data from BART.

2. This weighted availability measure is then used in the computation process identified below to establish the actual target goal.

ATMSM Formula

For Computing Annual Targets for Minority and Female Participation

$$ATM = \frac{G_p(TCE_t) - TME_p}{TE_a}$$

T - P

Where

G_p = target goal for DBE, SB and MWBE participation. When the policy goal is used to bring utilization in line with availability, then

TCE_t = total cumulative expenditure at time frame

TE_a = total annual BART expenditure

TME_p = total minority cumulative expenditure at present

T = time frame year

P = present year

B. Race-Neutral Means to Achieve Goals/Targets

BART should first exhaust all race/gender-neutral means to achieve any established target, goal or benchmark. Race/gender-neutral means include (1) purchasing adjustments, (2) prohibition of discrimination in purchasing, and (3) matchmaking.

C. Race and Gender-Conscious Tools

Again, in order to be legally defensible, Race/gender-conscious contract goals should be subject to a variety of limitations:

- Race and gender-conscious goals, where allowable at BART, should not be applied to every contract across all purchasing types.
- Race and gender-conscious goals should generally be “good faith efforts” subject to waivers.

- Race and gender-conscious goals should be reviewed by the Procurement Department and OCR to ensure that such goals do not disproportionately fall on one class Non-M/W/DBE contractors or subcontractors. For example, awards of all painting subcontracts to minority firms would impose an undue burden on non-minority-owned painting subcontractors.
- Race and gender-conscious goals (in purchasing) for subcontracting should apply to both Non-M/W/DBE and M/W/DBE prime contractors;
- Firms eligible to benefit from race and gender-conscious goals at BART should be subject to graduation provisions; and
- BART race and gender-conscious elements should be subject to annual review and sunset provisions.

12.5 SUMMARY

In summary, Miller³ Consulting, Inc. found that BART purchasing activities suggest that DBEs, SBs and MWBEs continue to have some difficulties obtaining significant contracts with BART. In submitting specific findings within the Disparity Study for BART, M³ Consulting formulated recommendations that allow BART to rely upon race and gender-conscious means when necessary to address ongoing hindrances to eliminating disparities, while also addressing DBE, SB and MWBE participation through race and gender-neutral efforts. Our economic and statistical utilization analyses could serve as part of the policy and procedure-making decisions needed to ensure enhanced and legally defensible DBE, SB and MWBE participation in BART's purchasing processes.